(2) Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

CHERYL ANN CLARK,

Petitioner,

v.

ELSEY MAXWELL MCLEOD,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the State of Colorado

REDACTED SUPPLEMENTAL APPENDIX

JAMES PARKER ROUSE, SR.
Counsel of Record

ROUSE & ASSOCIATES, P.C.
7400 E. ORCHARD ROAD
SUITE 3000
GREENWOOD VILLAGE, CO 80111
(303) 694-0694

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc. 800.890.5001

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APPENDIX D

DISTRICT COURT
CITY AND COUNTY OF DENVER, COLORADO

Case Number 96 DR 39
Courtroom 21

[Filed April 28, 2003]

In re the Custody and Support of:	)
	)
E.L.M.C.,	)
a minor child	)
	)
And concerning:	)
	)
Co-Petitioners:	)
	)
CHERYL ANN CLARK and ELSEY MAXWELL McLEOD	)
	)

PERMANENT ORDERS

THIS MATTER comes before the Court for Permanent Orders. This case has a long, difficult, emotional and highly contested history. Below the Court will set forth the facts of this case and attempt to briefly summarize the pleadings and the orders that have been previously entered in this case.

FINDINGS OF FACT

In approximately 1990 Co-Petitioner Cheryl Ann Clark (hereinafter "Dr. Clark") and Elsey Maxwell McLeod (hereinafter "Dr. McLeod") entered into a lesbian relationship. They discussed having a child either through in vitro fertilization or by adoption. In late 1994 Dr. Clark began the process of applying for the adoption of a child from China. (*See* Exhibit CCC.)

It is Dr. Clark's position that Dr. McLeod was not interested in this adoption and it was never Dr. Clark's intention that Dr. McLeod would participate as a co-parent in raising the child. The Court categorically rejects Dr. Clark's position. All the facts in this case prior to the parties' separation make it abundantly clear that the intent was that both Dr. McLeod and Dr. Clark would co-parent the adopted child.

The testimony of the social worker who did the background check of the adoption makes it clear that the Chinese government would not allow an adoption of a Chinese child to a homosexual or lesbian couple. For that reason Dr. McLeod was introduced to the social worker as a "roommate". The position of the agency doing the background check was "Don't ask, don't tell" in regards to whether an individual was in a lesbian relationship.

It is because of this position of the Chinese government all the adoption papers were made out in the name of Dr. Clark alone. Both Dr. Clark and Dr. McLeod went to China to pick up the minor child and until their separation jointly parented the minor child.

The adoption by Dr. Clark was recognized by the Chinese authorities in May of 1995. Her adoption of the minor child was recognized in Colorado on July 11, 1995.

On January 5, 1996 the parties filed a "Petition for Custody [C.R.S. 14-10-123(b)]." Although the legal effect of the Petition for Custody and the Court's subsequent approval of the petition may be debated, the intent of the parties is clearly expressed in the petition and the trial brief of Co-Petitioners filed on behalf of the parties. In the Petition for Custody, which was signed by both parties, they state as follows:

> Co-Petitioners have lived together for the past six and one-half years as a couple. They had a commitment ceremony on July 31, 1993. They carefully discussed having a family together. Clark's plans to adopt E.L.M.C. included an intention to have E.L.M.C. raised by Clark and McLeod as one family with two parents. [Emphasis added.)

Likewise, the trial brief submitted in support of the Petition for Custody states in part:

> E.L.M.C. considers each of the Co-Petitioners to be a parent; she refers to McLeod as "mommy" and Clark as "momma". She looks to both Co-Petitioners for love, affection and nurturance. Co-Petitioners have shared the financial cost of supporting E.L.M.C., and they share all major decisions involving E.L.M.C.'s life, including provisions of daycare during the times that Co-Petitioners must both work.

Other written statements by Dr. Clark and the actions of both parties clearly establish that there existed a plan, scheme

and design, and the intent of both parties, to be parents of E.L.M.C.. Examples of such written statements are shown below.

Dr. McLeod's Exhibit 2 is the "arrival announcement". This document, sent to friends of Dr. Clark and Dr. McLeod, announced the adoption of the minor child. The arrival announcement states in the first paragraph:

> E.L.M.C., a/k/a Yue Wei, was born in the Hunan providence of the People's Republic of China. She lived the first six months of her life in the Yue Yang Children's Welfare Home in Yue Yang, China. She now lives with two adoring moms. Z and Cheryl in Denver, Colorado. (Emphasis added.)

Another written statement by Dr. Clark showing her intent that Dr. McLeod be considered the mother of the minor child is in her petition for the name change of the minor child in September 1995. In this petition Dr. McLeod states for the reason for the change of name is "to acknowledge an important family member instrumental in E.L.M.C.'s adoption from China".

An additional example is Dr. Clark's filling out and signing the information sheet at the child's pediatrician on May 12, 1995. Where the form asked for father, the word "father" is crossed out and the word "mother" is put in its stead. Both parties are listed as "mother" on this document that Dr. Clark signed.

By September 15, 1997 the relationship between Dr. Clark and Dr. McLeod was beginning to be strained. It is informative to note that even during the initial strain of the relationship Dr. Clark made it clear that Dr. McLeod should

be considered, along with Dr. Clark, as the minor child's legal mother. Exhibit I is a letter dated September 15, 1997 from Dr. Clark to Dr. McLeod. Various portions of that letter are very revealing that there is no doubt that the intent and plan of the parties was they were going to co-parent this child. The third paragraph of the letter is very revealing.

> As I review the last two and one-half years since we adopted E.L.M.C., I see several areas that plague and distress me. First of all, shortly after we got back from China we started to talk about ways to protect your legal relationship with E.L.M.C.. This was important to both of us and we pursued and accomplished that the best we can in Colorado... we changed E.L.M.C.'s name to include yours. I changed my will before we left to designate you as her guardian should anything happen to me, and we pursued joint custody. All these actions work towards protecting our family integrity and specifically your relationship, legally, with E.L.M.C.

In the fourth paragraph of the letter Dr. Clark makes it abundantly clear that the minor child has attached to Dr. McLeod. Dr. Clark states:

> You attached to E.L.M.C. so strongly that I felt that I could not get in; that you would not let me in as you bonded to E.L.M.C. I have watched this attachment to her from the beginning and while much of it is wonderful... I also feel that you leave me out and had not really responded to my several requests to help me with that.

Another example of the parties co-parenting the child is the school directory which listed both as mothers of the minor child.

Very telling evidence was presented from the nanny. This woman was very reluctant to testify against either Dr. Clark or Dr. McLeod but truthfully answered the questions asked by counsel. The nanny testified that she was interviewed for the job by both Dr. Clark and Dr. McLeod. During her approximately two and one-half years of being the nanny for the minor child, it was clear to the nanny that they were equally parenting the child.

The Court finds beyond any reasonable doubt, and certainly by clear and convincing evidence, that the minor child has attached to both Dr. Clark and Dr. McLeod and considers both to be her mother. The parties accomplished their plan, scheme and intent. 'The minor child loves both women and the child has been nurtured and loved by both women.

PROCEDURAL HISTORY

Very briefly the Court will review the procedural history of this case and various orders that have been entered.

As stated before, this case began with the Co-Petitioners filing a petition for custody pursuant to C.R.S. 14-10-123(b) on January 5, 1996. By order dated March 25, 1996 a District Court judge approved the Petition for Joint Custody and signed an "Order Granting Joint Custody". In February 2001, at the time when the parties' relationship was breaking up, Co-Petitioner Dr. McLeod flied a verified Motion for Co-Parenting Time pursuant to C.R.S. 14-10-124. Dr. Clark responded asking the court to require Dr. McLeod to vacate

what had been their joint home and requested temporary and permanent orders for parenting time.

On April 3, 2001 Magistrate Diane Dupree entered a parenting time order that provided the parties with three days off and three days on of parenting time. The parenting time would be exercised in the home where the child had continuously lived. Subsequently, Dr. McLeod bought her own home and the parenting time was changed so it would be exercised in the respective homes of the parties. It continued to be a three day on, three day off, arrangement.

On June 1, 2001 Dr. Clark filed a trial brief entitled:

1. Validity of Joint Custody Order.

2. Implication of *Troxel v. Granville*.

In response, Dr. McLeod filed a brief regarding the same subject.

By order dated July 10, 2001, Magistrate Dupree found that the Joint Custody Order of March 26, 1996 was void for lack of subject matter jurisdiction. The basis of this decision by the Magistrate was that there was no controversy at the time and therefore the Court lacked subject matter jurisdiction. The Court cited the case of *Romer v. Board of County Commissioners of County of Pueblo*, 956 P.2d 566 (Colo. 1998).

In its July 10, 2001 order the Magistrate concluded that the decision by the United States Supreme Court in *Troxel v. Granville*, 530 U.S. 57 (2000) did not bar Dr. McLeod's parenting rights or bar her from having parenting time. The

Magistrate found that pursuant to the plan of the parties that both women have to be recognized as a parent to this child.

Dr. Clark appealed the magistrate's order to the Colorado Court of Appeals. In November 2002, the Colorado Court of Appeals dismissed the appeal without prejudice because there had been no final order entered in the trial court. Dr. Clark filed a writ of certiorari to the Colorado Supreme Court but the Court declined to exercise jurisdiction.

The parties have filed various "emergency" motions regarding Christmas time parenting time and summer time parenting time. Eventually the case was transferred from the Magistrate to a District Court judge. The District Court heard a Motion to Modify Temporary Orders. By order of the court in any of 2002 this Court changed the parenting time from three days on and three days off to a plan where each party would have the child for one week on and one week off.

On April 14 and 15 a hearing on permanent orders was held. Both parties had ample opportunity to present their positions. These Permanent Orders result from that hearing.

CONCLUSIONS OF LAW

Validity of the March 1996 order granting joint custody.

As previously stated the Magistrate in her July 10, 2001 decision concluded there was no controversy and therefore the Court lacked subject matter jurisdiction. The magistrate relied on the case of *Romer v. Board of County Commissioners of the County of Pueblo*, 956 P.2d 566 (Colo. 1998).

The Court disagrees with the Magistrate's analysis and conclusion.

In January 1996 Dr. McLeod was not recognized as having any right to what then was called custody. C.R.S. 14-10-123 gave individuals with certain stated connections to the minor child the right to petition for parental custody, now referred to as parental responsibility. The Colorado Supreme Court in *Romer* indicated that the proper test for determining proper exercise of judicial power is stated in the case of *Wimberley v. Ettenberg*, 194 Colo. 163, 570 P.2d 535. The *Wimberley* test standing is satisfied if (1) the Plaintiff was injured in fact; and (2) that the injury was to a legal right protected by a statutory provision which has allegedly been violated.

In this case Dr. McLeod was injured in the fact that she had no legal recognizable custodial rights to the minor child even though she was, in fact, acting as the child's parent and C.R.S. 14-10-123 protected Dr. McLeod's right to custody if the Court determined the circumstance warranted.

Whether or not the Magistrate's legal analysis of the validity of the judge's order of March 1996 is correct or not is not determinative. The Magistrate acted beyond all authority and jurisdiction granted to district court magistrates. Colorado Rules for Magistrates cannot be read, even in the broadest sense, that a magistrate has authority to reverse a District Court judge's decision. Quite the contrary. Rule 7 of the Rules [sic] for Magistrates sets up a procedure for a District Court judge to review a Magistrate order and, when necessary, overturn the Magistrate's order. The Magistrate does not have the authority to overturn a District Court judge's order.

Likewise, this Court has no authority to overturn a decision of another District Court Judge.

In entering Permanent Orders the Court will not rule on the validity of the March 1996 Order granting "joint custody". This Court's Order is separate from the March 1996 Order.

THE STATE OF THE LAW AFTER *TROXEL*

On June 5, 2000, the United States Supreme Court issued its decision in *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054. In *Troxel* the Supreme Court found a very broad statute providing for visitation rights "of any person" was a violation of the fundamental right of a parent to raise his or her child. The case involved a request for visitation by paternal grandparents of two minor children of Ms. Granville.

The language in *Troxel* is very interesting and, binding on this Court. The Supreme Court stated:

> That language [referring to the language of the statute] effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's child to state-court review. Once the visitation petition has been filed in the court and the matter is placed before a judge, a parent's decision that visitation would not be in the child's best interest is accorded no deference. Section 26.10.1603 contains no requirement that the court accord the parent's decision any presumption of validity or any weight whatsoever.

The court went on to state as follows:

> The Superior Court's Order was not founded on any special factors that might justify the state's interference with Granville's fundamental right to

> make decisions concerning the rearing of her two daughters.

Going on in this same vein, the United States Supreme Court said:

> The problem here is not that Washington Superior Court intervened, but that when it did so, it gave no special weight to Granville's determination of her daughters' best interest.

Again, not considering the joint parenting order of 1996, this case presents the situation where Dr. Clark is the only recognized parent. For under *Troxel* this Court must give special weight to Dr. Clark's position regarding parenting responsibility and parenting time. This Court, however, is free to determine "special factors", override Dr. Clark's position and to determine by clear and convincing evidence that any presumption due Dr. Clark's position is outweighed in determining the best interest of the minor child.

This Court finds beyond clear and convincing evidence and beyond a reasonable doubt that special factors do exist which require this Court to interfere with Dr. Clark's wishes. Some of these factors are stated below.

1. Dr. Clark requested this Court to recognize Dr. McLeod's position as a co-parent.

2. Dr. Clark petitioned the Court to legally change the name of the child to reflect the importance of Dr. McLeod in this child's life.

3. Dr. Clark, along with Dr. McLeod, entered into a plan for joint parenting of the minor child.

4. Dr. Clark permitted Dr. McLeod to jointly parent the minor child and actively encouraged Dr. McLeod's participation in raising the minor child and in encouraging the minor child to bond with Dr. McLeod.

5. Without a doubt the minor child equally recognizes the parties as her parents. *See* Co-Petitioner's Exhibit 1 where the minor child states "I love my mommy and momma." The child refers to Dr. McLeod as "mommy" and Dr. Clark as "momma". The co-parenting plan that was initiated at the time of the child's adoption has been extremely successful. The minor child's first grade teacher at the hearing to modify temporary orders stated, at a time when the parties were exercising joint parenting responsibility and [sic] equal parenting time stated "Keep doing what you're doing because it works extremely well. The child is doing beautifully."

6. The second grade teacher described the minor child as doing extremely well academically, socially and in every other way.

Dr. Clark has participated in creating these special factors. She may not now ask this Court to disregard these factors. To do so would be without a doubt to disregard the best interests of the minor child. The Court concludes that under the principles enumerated in *Troxel*, that in this case joint parenting responsibility must be awarded to both Dr. Clark and Dr. McLeod, and a parenting plan that is approximately equal should be implemented.

PARENTAL RESPONSIBILITY

There can be no doubt that by filing the joint petition for custody Dr. McLeod has requested the Court to grant her co-parenting responsibility. Custody is now referred to as parental responsibility.

Considering the factors in C.R.S. 14-10-124 the Court determines that for all matters, except the two exceptions stated below, Dr. Clark and Dr. McLeod should have joint parental responsibility. There can be no doubt that for the seven and one-half years the minor child has been with Dr. Clark and Dr. McLeod they have shared parental responsibility. It is in the best interest of the minor child that joint parental responsibilities continue.

Pursuant to C.R.S. 14-10-124(1.5)(b)(I) the Court does find there is credible evidence of the ability of the parties to cooperate and make decisions jointly. Certainly there has been a great deal of strife between the Co-Petitioners. Notwithstanding the strife the parties have been able to jointly make decisions regarding the wellbeing of the minor child. An example is in education. Both parties have agreed that the child should remain in Slavan Elementary School. Decisions regarding health care have been made jointly and pursuant to the pediatrician's testimony there has been no problems in administering health care to the minor child.

The Court finds C.R.S. 14-10-124(1.5)(b)(II) that there has been a pattern of involvement by the parties with the child which reflects a system of values, time, commitment and mutual support that would indicate mutual decision-making can be carried out. The history shows that by this mutual decision-making the child has enjoyed a "positive and nurturing relationship" with both parties.

The Court will award sole parental responsibility to Dr. Clark in the area of religion and dental care. The evidence has established that Dr. Clark and Dr. McLeod will never be able to agree regarding the religious upbringing of the minor child.

Pursuant to this Court's previous order, which has been obeyed by Dr. Clark, the Court is requiring that Dr. Clark make sure that there is nothing in the religious upbringing or teaching that the minor Child is exposed to that can be considered homophobic.

It appears that as to dental care and orthodontia care, it is best that Dr. Clark be sole decision-maker. The dentist involved seemed reluctant to be responsible to two masters. It will avoid a great deal of strife and provide for good dental care if Dr. Clark is the sole decision-maker in this area. Dr. Clark must keep Dr. McLeod informed about all dental care.

PARENTING TIME

In setting forth a schedule for parenting time, this Court must consider the factors enumerated in C.R.S. 14-10-124(1.5)(a)(I-XI).

The first factor is the wish of the child's parents as to parenting time. In this case Dr. Clark has submitted a parenting time plan that in 2005 would have no court-ordered parenting time for Dr. McLeod. Dr. McLeod wishes a parenting time that is 50/50.

The second factor is the wishes of the child if the child is a sufficient age. The minor child in this case is not of sufficient age that the Court has talked with the child or through an intermediary learned of the child's wishes.

However, it appears the child is enjoying the shared parenting time.

The next factor is the interaction and interrelationship of the child with her parents and any siblings. The interaction and interrelationship of the minor child with both parties has been extremely beneficial.

The next factor is the child's adjustment to her home, school and community. All the witnesses that have testified have unequivocally stated that the minor child is doing extremely well under the present shared parenting plan.

The next factor to be considered is mental and physical health of the individuals involved. Fortunately both Dr. Clark and Dr. McLeod are healthy both mentally and physically.

The next factor is the ability of the parties to encourage the sharing of love, affection and contact between the child and the other party. Fortunately, even during all the strife, both parties have shown the ability to encourage the minor child to love and to have affection for the other party. Neither party has spoken disparagingly about the other party to the minor child.

The next factor is whether the past pattern of involvement of the parties with the child reflect a system of values, time, commitment, and mutual support. As mentioned previously, the past pattern of involvement of the parties has reflected a shared system of values, has been a shared time commitment, and for the most part has been mutually supportive.

The remaining factors enumerated in the statute are not really involved in this case. Based upon the consideration of

all the factors, the Court sets forth a parenting time plan below.

A. Weekday and Weekend Schedule

The child will be in the care of each party on alternate weeks from Friday after school or child care until the following Friday after school or child care.

B. Summer Parenting Time Allocation

The parties have stipulated to summer parenting time for 2003. For summer parenting time for 2004 on the court orders that the minor child will be with Dr. McLeod Monday 8:30 AM through Thursday 3:30 PM, and with Dr. Clark from Thursday 3:30 PM through Monday at 8:30 AM. There will be no changes during summer unless mutually agreed to by both parties in writing.

C. Summer Vacation Parenting Time

Each party shall have 2, one week vacations during the summer months. Each party shall provide to the other party her summer vacation requests by February 1st of each year If an agreement has not been reached by February 15th, Dr. Clark will have first choice of vacation dates in even years, and Dr. McLeod will have first choice in odd years. The 2nd choice party may not schedule her vacation time closer than at least 7 days to the 1st choice parents' vacation time to permit Minor child time to regroup after each vacation.

D. Summertime Activities

There will be no schedule changes or interruptions in parenting time for activities during the summer. Except for when either party is scheduled for vacation, any routine activities from the school year (e.g. piano lessons and gymnastics) will be maintained as best as possible during each parents scheduled time.

E. Holiday and Special Occasion Parenting Time

1. **The Holiday and Special Occasion** schedule shall take precedence over regularly scheduled parenting time. Once the Holiday or Special Occasion is over, the regular schedule shall resume. Holidays and Special Occasions shall be alternated yearly between the parties.

2. **Cleo Parker Robinson week for Summer Institute:** Will alternate yearly between the parties. Dr. Clark shall have odd years, Dr. McLeod will have even years.

3. **Chinese Heritage Camp:** Will alternate yearly between the parties. The party who did not have Chinese Heritage Camp last year will have the camp this year. The parties shall thereafter alternate taking the minor child to the Chinese Heritage Camp.

4. **Winter break:** Will be divided into equal halves. Winter break commences upon dismissal the last day of school prior to the start of the break and ends the morning of returning to school when the break is finished, The first half of the break

includes Christmas Eve and Christmas Day, and the second half includes New Years Eve and New Years Day. The exchange time will be in the middle of winter break at noon. If for some reason Christmas does not fall into the first half of winter break then the party scheduled for Christmas will have Minor child from 3:30 PM Christmas Eve through Christmas Day at 8:30 PM. Dr. McLeod shall have the first half of Winter Break, including Christmas, on odd years, and the second half, including New Years on even years. Dr. Clark will have the first half, including Christmas, on even years, and the second half, including New Years on odd years.

5. **Martin Luther King Weekend:** Commences after school on Friday and ends upon return to school on Tuesday. Dr. Clark will have even years. Dr. McLeod will have odd years.

6. **President's Day Weekend:** Commences after school on Friday and ends upon return to school on Tuesday. Dr. Clark will have odd years. Dr. McLeod will have even years.

7. **Adoption Day May 4th.:** Will commence 10 AM on the morning of Adoption Day (or after school if on Friday) and ends the following morning at 10 AM. If this day is during the week, it begins after school until school begins the following day. Dr. McLeod will have odd years. Dr. Clark will have even years.

8. **Mother's Day:** Begins at 10 AM on Mother's Day and ends at the start of school Monday morning.

Dr. Clark will have odd years. Dr. McLeod will have even years.

9. **Memorial Day Weekend:** Begins upon dismissal from school on Friday and ends with the start of school on Tuesday, Dr. Clark will have odd years. Dr. McLeod will have even years.

10. **July 4th:** Begins at 3:30 July 3rd and ends at 12 noon on July 6th. Either party can include the 4th of July as part of their vacation on the year they are scheduled for the holiday. Dr. McLeod will have odd years. Dr. Clark will have even years.

11. **Labor Day Weekend:** Commences after school on Friday and ends upon return to school on Tuesday. Dr. Clark will have odd years. Dr. McLeod will have even years.

12. **Halloween:** Begins at 3:30 October 31st and ends upon return to school the following day. If the holiday falls on a weekend, it will commence with the scheduled party at 3:30 and end at 12 noon the following day. Dr. McLeod will have even years. Dr. Clark will have odd years.

13. **Minor child's Birthday November 12th:** Will begin after school on the day of her birthday until school begins the following day if on a week day. If on a Friday, it begins after school on that day until 10 AM the following day. If on Saturday or Sunday it begins at 10 AM and ends at 10 AM or when school begins on Monday. Dr. McLeod will have odd years. Dr. Clark will have even years.

14. **Thanksgiving Break:** Begins at 8:00 AM on Wednesday and ends with the start of school on Monday following Thanksgiving Day. Dr. Clark will have odd years. Dr. McLeod will have even years.

15. **Dr. Clark's and Dr. McLeod's Birthday:** Each party may have Minor child on their birthday and for an overnight. If the party's birthday is on a weekday, the party may be with Minor child after school until the beginning of school the following day. If the party's birthday is on a weekend, parenting time shall be from 10 AM on that day until 10 AM the following day, or until the beginning of school Monday if the party's birthday is on Sunday.

F. Adjustments to Schedule

The parties shall reasonably cooperate with each other to adjust schedules as may be necessary to accommodate work schedules, activities of the child or other commitments. Both parties, however, must agree to the modification, and if one party does not agree, the parties shall follow the schedule provided herein.

G. Notice of Non-Exercise of Parenting Time

Each party is responsible for providing care for Minor child during parenting time. If either party is unable to care for the child during their scheduled parenting time, it is that party's responsibility to arrange alternative care. If either party is unable to arrange for care of the child, that party should notify the other party at least forty-eight (48) hours prior to the commencement of any scheduled

parenting time of the intention not to exercise such parenting time. If the party must use child care to accommodate the party, the party unable to exercise parenting time shall be responsible for paying such childcare costs.

H. Special Events

Neither party shall unreasonably refuse to allow additional parenting time if the other party wants to take the child to a wedding, funeral, christening or other similar event, so long as the party requesting the schedule change will provide the other party with forty-eight (48) hours notice. If this involves out of state travel, it shall not exceed 4 nights. If this is within the state, it shall not exceed 3 nights.

I. Removal from School

Either party, upon notice to the other party, may remove the child from school for an appropriate, special, or major event, so long as the removal is not likely to result in harm to the child's grades and education.

J. First Option/Childcare

If a party must travel out of town or requires care for the child for more than forty-eight (48) consecutive hours, the party with scheduled parenting time shall notify the other party in advance and allow the other party the first option to spend that time with the child. If the party who is offered the option declines, then the offering party shall obtain appropriate childcare at her sole expense.

K. Therapy for the Minor Child

Within 3 months of the date of this order, the parties shall select a therapist for the minor child. If the parties are unable to agree who should be the therapist, the court will decide based upon the C.V.'s submitted by the parties.

It is doubted that the minor child needs a great deal of therapy at this time. However, it is best that the minor child have a neutral party who is a mental health expert who is known to the minor child and a person with whom the child feels comfortable discussing all issues. In all probability as the child grows older other children will, as children do, make comments about her having two mothers. When hurtful comments are made it is in the best interest of the child to have a known therapist with whom to discuss such issues.

CONCLUSION

The Court is of the strong opinion the above order of joint parenting, decision-making and joint parenting time is in the best interests of the minor child. Strong parental attachments should not be broken unless the minor child is in danger.

Certainly one or both of the parties have a right to appeal. But the appeal process takes time. Even if this Court's decision is reversed, the joint parenting responsibility and the parenting plan ordered entered by this Court will be in effect for the foreseeable future. The parties are encouraged to put their differences aside and make the Court older work for the best interests of the minor child.

Dated this 28th day of April, 2003.

BY THE COURT:

/s/ _____
John W. Coughlin
District Court Judge

APPENDIX E

DISTRICT COURT,
COUNTY OF DENVER, STATE OF COLORADO
1437 Bannock Street, Room 256
Denver Colorado 80202

Case Number 90DR2788
Courtroom 21

[Filed November 9, 2001]

In re the Custody and Support of:	)
	)
E.L.M.C.	)
	)
and concerning	)
	)
CHERYL ANN CLARK and ELSEY MAXWELL McLEOD, Co-Petitioners.	)
	)

ORDER

THIS MATTER is before the Court on Co-Petitioners' Motions for Review of the Magistrate Diane Dupree's Order of July 10, 2001. The Court having reviewed the pleadings, the file and the applicable authority affirms the order of the Magistrate.

ORDERED this 9th day of November 2001.

BY THE COURT:

/s/ _____
R. Michael Mullins
District Court Judge

APPENDIX F

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO
Court Address: 1437 Bannock Street, Room 256
Denver Colorado 80202

Case Number 96 DR 39
Courtroom 15A

[Filed July 10, 2001]

In re the Custody and Support of:	)
	)
E.L.M.C.,	)
minor child,	)
	)
And Concerning,	)
	)
CHERYL ANN CLARK and ELSEY MAXWELL McLEOD, Co-Petitioners.	)
	)

ORDER

THIS MATTER comes before the court on McLeod's Verified Motion for Establishment of Parenting Time Schedule Pursuant to C.R.S. Sec. 14-10-124 filed February 22, 2001. On April 3,2001 the parties were before the court for an emergency hearing for interim orders; Co-Petitioner Clark was present with counsel, Jordan M. Fox, Esq., and Co-Petitioner McLeod was present with counsel, Gina B.

Weitzenkorn, Esq. The court entered an order for temporary parenting time and further ordered the parties to brief two initial issues which have been raised by the parties. The court has now considered the pleadings and briefs of the parties, the applicable statutes and caselaw, the court file including the Trial Brief of Co-Petitioners filed February 6, 1996, and enters the following findings of fact, conclusions of law and orders:

PERTINENT FACTS

1. The facts in this case are largely undisputed and may be briefly stated as follows: The parties are two women who have lived in a committed relationship for many years. To fulfill their mutual desire to be parents, the parties agreed in 1994 that Clark would adopt a baby girl from China who was born November 12, 1994. The foreign adoption was domesticated in Colorado on July 11, 1995. The parties then filed a petition with accompanying brief for an order of joint custody, and on March 25, 1996 the court entered a Joint Custody Order. The parties have now ended their domestic partnership and dispute the allocation of parental responsibility and parenting time for their minor child, E.L.M.C.

ANALYSIS AND CONCLUSIONS OF LAW

2. Two initial issues are presented to the court for resolution: (1) Is the Joint Custody Order entered by the court on March 25, 1996 void for lack of subject matter jurisdiction? and (2) Does the United States Supreme Court decision in *Troxel v. Granville* require the court to defer to the decisions of Clark, the adoptive parent, regarding the welfare of the parties' minor child E.L.M.C.?

Is the Joint Custody Order of March 26, 1996 void for lack of subject matter jurisdiction?

3. Clark argues the Joint Custody Order is void because there was no controversy at issue when the order entered. McLeod counters that Clark submitted herself to the jurisdiction of the Denver District Court when she filed her petition for custody in 1996. McLeod further argues that because Clark has never filed a motion for relief pursuant to C.R.C.P. Rule 60 requesting the order be set aside, the six months time limit has passed; therefore, the order is valid and the parties are bound by the order.

4. Neither party would have had reason to request Rule 60(b)(3) relief because there was no controversy. Where there is no live controversy between the parties, the trial court lacks subject matter jurisdiction. *Robertson v. Westminster Mail Company,* 2000 WL 1228775 at *5 (Colo. App. 2000). Standing giving rise to subject matter jurisdiction requires (1) the plaintiff was injured in fact; and (2) that injury was to a legal right protected by statutory provision which allegedly has been violated. *Romer v. Board of County Commissioners of the County of Pueblo,* 956 P.2d 566 (Colo. 1998).

5. McLeod never filed an action for a determination of the existence or non-existence of a mother-child relationship between herself and E.L.M.C. under the Children's Code. Instead, the parties filed a petition for custody in 1996 pursuant to C.R.S. Sec. 14-10-123, for the stated purpose "to provide essential legal protection to their family" (*see* Trial Brief of Co-Petitioner' s page 5). It is not disputed that there was no controversy at the time Clark filed her petition and when the Joint Custody Order entered in 1996. The court finds no authority for the proposition that C.R.S. Sec. 14-10-123 confers standing without a controversy, and no authority

under this statute to confer a legal status on parties or create a legal relationship between them. Parties to an action cannot Confer subject matter jurisdiction upon the court by agreement or request. A mere private agreement between two consenting adults cannot of itself confer jurisdiction upon the court to modify or enforce an alleged agreement. *Riffenburg v. Riffenburg,* 585 A.2d 627 (R.I. 1991). Accordingly, the court concludes that the Joint Custody Order entered March 25, 1996 is void as a matter of law for lack of subject matter jurisdiction.

Does the U. S. Supreme Court decision in *Troxel v. Granville* require the court to defer to the decisions of Clark, the adoptive parent, regarding the welfare of the minor child?

6. In *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct 2054 (2000), the United States Supreme Court held as overly broad and unconstitutional, a Washington State statute allowing any person to petition the court for visitation rights at any time. In its decision, the Court reaffirmed that the Fourteenth Amendment includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests including a parent's fundamental right to make decisions concerning the care, custody and control of their children. Clark's position is that while Colorado's third party custody and visitation statutes are more restrictive than the Washington statute, the final decision under current Colorado law rests on the court's determination of the child's best interests. C.R.S. Sec. 14-10-124. Clark argues that she is the only legal parent of E.L.M.C., is a fit parent, and pursuant to *Troxel,* the trial court must defer to her decisions regarding the care, custody and control of E.L.M.C.

7. McLeod counters that she is also a parent under Colorado law since Colorado recognizes the psychological parent, or *de facto* parent based on the parties' actual relationship and intent. She further argues that just as marriage is not required, a biological connection between a parent and a child is not required to show presumptive parenthood under the express language of C.R.S. Sec. 19-4-105(1)(d). McLeod cites *In Re the Marriage of Dureno,* 854 P.2d 1352 (Colo. App. 1992) for her position that under Colorado law, if two persons of the same sex live together and assume parental responsibilities for raising a child, upon their separation both parties have a legal right to claim parental responsibilities and parenting time. Because she is E.L.M.C.'s parent under Colorado law, McLeod argues the *Troxel* decision does not affect the trial court's authority to determine E.L.M.C.'s parenting time in her best interests.

8. In order to consider application of *Troxel* to the case at bar, the presumption must be made that because Clark is the adoptive parent, she is E.L.M.C.'s only parent and McLeod is merely a third party non-parent. However, the facts in this case do not support such a presumption. The United States Supreme Court has found that children have an independent constitutional interest in parent-child relationships which extends to psychological parents, as well as biological and adoptive parents, since psychological parenting - day to day care, nurturance, and guidance - is the only kind of parenting that matters to a child. *See Michael H. v. Gerald D.,* 491 U.S. 110 (1989). The Court acknowledged in *Lehr v. Robertson,* 463 U.S. 248, 260-263 (1983), that a parent's constitutional right in the welfare of their children does not attach by the mere fact of biology alone.

9. The Colorado Supreme Court has recognized the concept of the psychological parent and affirmed the

importance of psychological bonds non-parents develop with children who have been in their physical possession and control for a significant period of time. *See In the Matter of the Custody of C.C.R.S.* 892 P.2d 246 (Colo. 1995). The term "parent" as defined in C.R.S. Sec. 19-1-103(82) includes persons with parental responsibilities and natural parents as determined under the Uniform Parentage Act. C.R.S. Sec. 19-4-106 directly recognizes parenthood in a person who is not biologically involved in creating the child. Further, state courts have found that when a child is procreated because a medical procedure was initiated and consented to by intended parents, father's consent to the surrogate mother process was sufficient to make him the legal father although his wife was not the biological mother. *See People v. Sorenson,* 437 P.2d 495 (Cal. 1968); *Leven v. Leven* 645 N.E.2d 601 (Ind. 1994); *K.S. v. G.S.,* 440 A.2d 64 (N.J.App. 1981)

10. In a *post-Troxel* case in California, *Guardianship of Olivia J,* 101 Cal.Rptr. 2d 364(Cal.App.2000), a former domestic partner filed for guardianship of the former partner's biological child. In that case the California appeals court expressed a dilemma facing most jurisdictions today stating, "Courts have had to struggle with the application of the statutory definition of a parent to many factual circumstances likely not anticipated when these definitions were legislated." The court held that the loss of a relationship with a nonparent who acted as a *de facto,* or psychological parent, is a factor the court may consider in determining whether parental custody is detrimental to the child.

11. In *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000), the Rhode Island Supreme Court refused to restrict parenting time for a former domestic partner citing the parties' earlier court-approved stipulation establishing a visitation schedule the parties had determined to be in the child' s best interests. The

Court found that the Family Court had jurisdiction to determine the existence of a *de facto* mother-child relationship and that a biological parent's interest is not an unqualified one because those rights do not always outweigh those of other parties asserting parental rights, let alone do they trump the child's best interests. The court distinguished the case from *Troxel* by noting that Rhode Island's third party statute only applies to parties with a parent-like relationship to a child. Clark argues that the *Rubano* facts are different from the case at bar because since she separated from McLeod, she has never agreed that the level of contact requested now by McLeod is in E.L.M.C.'s best interests.

12. Had Clark and McLeod been a traditional family of man and woman, they could have legally married, had children and enjoyed the legal presumption that they are equally fit parents. Upon their divorce, the court would apply the best interests standard to determine parental responsibilities and parenting time with their children. However, these parties are not a traditional family; they are two women. Instead of a legal marriage, they had a commitment ceremony. When they wanted a child, the law allowed that only one of them could be the adoptive parent. Despite this legal restriction, it cannot be disputed that these parties intended they would be equal parents of E.L.M.C. They both flew to China to complete the adoption; upon completion of the adoption, they changed their daughter's name legally to E.L.M.C. McLeod took three months off work and Clark took two months off work to care for their baby. Both women then reduced their work to half-time schedules so they could each be responsible for a significant amount of E.L.M.C.'s care. E.L.M.C. calls McLeod "Mommy" and Clark "Momma." The parties shared the major decisions involving their daughter and the financial cost

of supporting her. E.L.M.C. has been integrated into the extended families of both parents.

13. In a traditional family, these circumstances would require both parents to be the adoptive parents. Because they were not a traditional family, these parties were required to maneuver many legal obstacles in order to insure their equality as parents. Both parties made wills leaving their estate in trust to E.L.M.C.. Clark designated McLeod as E.L.M.C.'s guardian if Clark should die or become incapacitated. Clark also executed a durable power of attorney authorizing McLeod to make medical or financial decisions for E.L.M.C..

14. The evidence is overwhelming that before their breakup, the parties considered themselves equal parents of E.L.M.C. The request for a joint custody order in 1996 was the parties' attempt to circumvent the result of an adoption law which prevents two single adoptive parents for E.L.M.C. In their plea to the court for a joint custody order, they avowed "there is no presumption that one or the other is better," and that E.L.M.C. "knows both parties to be her mothers and knows no other parents." They specifically stated that if they were ever to separate, an award of joint custody would "protect the right of McLeod to have an ongoing relationship with E.L.M.C., even though McLeod is not related by biology or adoption." The parties further claimed that, "Maintaining continuity would be crucial to the child if the family breaks up; it would assure her continued relationship with both parents and her McLeod relatives."

15. The court in *Rubano, Id.,* found that even biological parenthood does not always endow that parent with an absolute right to prevent third parties from acquiring parental rights, and found that the biological parent had rendered her

own parental rights less exclusive and less exclusory than they otherwise would have been had she not, by word and deed, allowed *Rubano* to establish a parental bond with the child and then agreed to allow reasonable visitation. Clark used extraordinary measures to insure her family all the legal protection enjoyed by a traditional family. Indeed, Clark's claim now of sole parent turns not on her choosing that status, but only on the legal prohibition of two single persons adopting the same child. The court finds it disingenuous that now when it no longer serves her purpose to have parental issues determined as those of a traditional family, Clark attempts to invoke the very legal restriction she previously reviled and requests the court find that she is the only parent of E.L.M.C.

16. The law is well settled that in custody proceedings the welfare and best interests of the child are the paramount consideration. Our foremost priority is to resolve the dispute in a way that minimizes the detriment to the child. *C.C.R.S.* There is no evidence before the court that McLeod is not a parent equal to Clark; while she cannot legally be an adoptive parent, the "court finds she is clearly a psychological, *de facto* parent to E.L.M.C. The court further finds that neither Colorado law nor the holding in *Troxel* requires McLeod to be designated a non-parent or the trial court to defer to Clark's decisions regarding the welfare of E.L.M.C.

ORDER

1. The Joint Custody Order entered March 25, 1996 is hereby declared void as a matter of law for lack of subject matter jurisdiction.

2. McLeod's Verified Motion for Establishment of Parenting Time Schedule Pursuant to C.R.S. Sec. 14-10-124

shall be determined under Colorado law with the presumption that the parties have shared the physical and legal care of the child while they were an intact family. *See In Re Garst v. Godfrey,* 98 CJC, A.R 1319 (3/19/98). The best interests standard shall be applied as is consistently used in an original determination of parental responsibilities and parenting time. *See In Re Marriage of Monteil,* 960 P.2d 717 (Colo. App. 1998).

SO ORDERED this 10th day of July, 2001.

BY THE COURT:

/s/ _____
Diane J. Dupree
District Court Magistrate

cc: Jordan M. Fox, ATP
Cage & North, P.C.
1433 17th Street
Denver, CO 80202

Gina B. Weitzenkorn, ATR
Mills & Weitzenkorn,.P.D.
1441 Eighteenth Street, Suite 150
Denver, CO 80202

APPENDIX G

DISTRICT COURT,
DENVER, COLORADO
Denver City and County Building
1437 Bannock Street, Room 256
Denver Colorado 80202
Telephone: (303) 640-2491

Case Number 96 DR 39
Courtroom 21/15a

[Filed June 5, 2001]

In re the Custody and Support of:	)
	)
E.L.M.C.,	)
minor child,	)
	)
And concerning	)
	)
CHERYL ANN CLARK and ELSEY MAXWELL McLEOD, Co-Petitioners.	)
	)

ORDER

The parties and their counsel appeared for a hearing on Petitioner Clark's *Verified Forthwith Motion For Temporary Orders*. After an initial status conference with counsel in chambers, and consultation with the parties, the Court entered the following orders:

1. The parties to this action were involved in a domestic partnership. Co-Petitioner Clark is the legal (adoptive) parent of the minor child of this action, E.L.M.C., born on November 12, 1994. The parties subsequently obtained an order from this Court granting them joint custody of the minor child. Now that the parties' relationship has ended, this Court is called upon to devise an appropriate parenting time schedule for the parties.

2. The Court notes that both parties were involved in the child's life and that on an interim basis, the Court believes E.L.M.C. should spend equal time with both parties.

3. The Court orders that the parties shall share parenting time on a 3 days on/3 days off schedule.

4. This schedule shall begin with Dr. Clark having Tuesday, Wednesday, and Thursday overnights. Dr. McLeod shall then have Friday, Saturday and Sunday overnights. This schedule shall continue to rotate with each party having three uninterrupted days with the child. If an exchange occurs on a weekend or other non-school day, the parties shall conduct the exchange at 10:00 a.m.

5. Dr. Clark shall exercise parenting time in the parties' former joint home and Dr. McLeod shall exercise her parenting time w/ E.L.M.C. in her new residence.

/s/ Mag. Dupree 6/5/01

~~5. At the present time, the child's shall continue to reside in the parties' former joint home. The parties shall~~

~~absent themselves from this residence when they do not have time with the child.~~

6. On the mornings when Ms. McLeod has the minor child, if she is unable to arrange a spot for the child in Kaleidoscope, Ms. Clark shall be permitted to care for the child in the home in the mornings from the time Ms. McLeod leaves for work until such time as the child is taken to school.

7. The parties shall share jointly in the custodial responsibility for major decisions concerning E.L.M.C.'s general welfare, education, health and medical care on a temporary basis. Specifically, both parties shall share in the legal decision making in the areas of major medical decisions of a non-emergency nature, major educational decisions such as public or private schooling and post secondary education, and major decisions concerning religious upbringing on a temporary basis.

8. On a temporary basis, routine day to day decisions and emergency medical care decisions shall be made by the party in whose residential care E.L.M.C. is in at the time the decision is made. The parties shall cooperate with one another in establishing mutually supporting arrangements regarding such routine decisions.

9. On a temporary basis, except for normal trips, vacations and holidays, neither party shall remove E.L.M.C. from the state of Colorado without written consent of the other or an Order of Court obtained after notice and opportunity for hearing. During normal trips, vacations and holidays, each party shall

keep the other informed as to E.L.M.C.'s general whereabouts.

10. In order that there be the greatest possible love and respect between the parties and E.L.M.C., each party shall make a positive effort to promote such love and respect between E.L.M.C. and the other party. The parties agree to refrain from maligning the other in the presence of E.L.M.C. and refrain from any act by word or deed which might tend to have a negative effect on a loving, companionable and harmonious relationship between E.L.M.C. and each party. The parties further agree to discourage third parties from disparaging the other party to or in the presence of E.L.M.C.

11. An issue has arisen regarding the appropriate legal standard applicable to this case based on the recent U.S. Supreme Court decision in *Troxel v. Granville,* 120 S.Ct. 2054 (June 5, 2000). The parties shall have until June 1st, 2001 to submit written briefs to the Court for its determination of this issue. The parties shall also include in their briefs their position on the validity of the parties' 1996 joint custody order.

12. The Court shall retain such jurisdiction over this matter as is provided by Colorado law.

Dated this 5th day of June , 2001.

BY THE COURT

/s/ _____
HONORABLE DIANE J. DUPREE
DISTRICT COURT MAGISTRATE

APPROVED AS TO FORM:

CAGE & NORTH, P.C.

/s/ _____

Jordan M. Fox (No. 23971)
Attorney for Petitioner Clark
1433 Seventeenth Street
Denver, Colorado 80202
Telephone: (303) 295-0202
Facsimile: (303) 297-2220

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing ORDER was duly served upon the following by depositing same in the U.S. Mail, postage prepaid, this 20th day of April, 2001:

Gina B. Weitzenkorn (No. 7170)
Attorney for Co-Petitioner ELSEY MAXWELL MCLEOD
MILLS & WEITZENKORN, P.C.
1441 18th Street, Suite 150
Denver, Colorado 80202
Telephone: (303) 292-1441
Facsimile : (303) 292-1126
E-mail : gbw@mwlawpc.com

By: /s/ _____
Sarah J. Conley

APPENDIX H

DISTRICT COURT,
CITY AND COUNTY OF DENVER,
STATE OF COLORADO

Case Number 96 DR 39
Div./Ct.Rm. 21

[Filed March 25, 1996]

In re the Custody and Support of:	)
	)
E.L.M.C.,	)
Minor Child	)
	)
and concerning	)
	)
CHERYL ANN CLARK and ELSEY MAXWELL McLEOD, Co-Petitioners.	)
	)

ORDER GRANTING JOINT CUSTODY

This matter came on for hearing on March 25, 1996 on the Petition for Custody filed by Co-Petitioners, Cheryl Ann Clark and Elsey Maxwell McLeod. The co-Petitioners were present and were represented by James A. Henderson. Having heard the statements of counsel and the evidence of the parties, the court makes the following findings and orders:

1. The Court finds that it is in the best interest of the minor child, E.L.M.C., that the Court grant joint custody of the minor child to the Co-petitioners, Cheryl Ann Clark and Elsey Maxwell McLeod.

2. The Court therefore grants the Petition and orders that the Co-Petitioners, Cheryl Ann Clark and Elsey Maxwell McLeod, shall share joint custody of the minor child, E.L.M.C.

Date: 3/25/96 /s/ _____
JUDGE OF THE DISTRICT COURT

APPENDIX I

DISTRICT COURT,
DENVER, COLORADO
Denver City and County Building
1437 Bannock Street, Room 256
Denver Colorado 80202
Telephone: (303) 640-2491

Case Number 96 DR 39
Courtroom 21

[Filed June 1, 2001]

In re the Custody and Support of:	)
	)
E.L.M.C.,	)
minor child,	)
	)
and concerning	)
	)
CHERYL ANN CLARK and ELSEY MAXWELL McLEOD, Co-Petitioners.	)
	)

Attorney or Party Without Attorney (Name and Address):
Jordan M. Fox, Esq.
Attorneys for Co-Petitioner CHERYL A. CLARK
CAGE & NORTH, P.C.
1433 17th Street
Denver, Colorado 80202
Phone Number: (303) 295-0202

FAX Number: (303) 296-7403
E-mail: jfox@cagenorth.com
Atty. Reg. # 23971

TRIAL BRIEF: 1) VALIDITY OF JOINT CUSTODY ORDER
2) IMPLICATION OF *TROXEL vs. GRANVILLE*

Co-Petitioner, Cheryl A. Clark, M.D., hereby files this Trial Brief on the following two issues: 1) Whether the *Joint Custody Order* issued by this Court is void for lack of subject matter jurisdiction; and 2) Whether *Troxel vs. Granville* requires this Court to defer to Dr. Clark's designation of visitation between the minor child and Dr. McLeod, a non-parent.

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I. BACKGROUND

Dr. Clark and Dr. McLeod were involved in a domestic partnership. During this relationship, Dr. Clark adopted a baby girl from China who was born on November 12, 1994. Dr. Clark completed this adoption on May 4, 1995 and Dr. Clark's foreign adoption was domesticated in Colorado on July 11, 1995. Following the adoption, the parties to this action sought and received an order from this Court granting them joint custody of the minor child. The parties' have ended their domestic partnership and dispute whether Dr. McLeod should have any allocation of parental responsibility and what, if any, visitation Dr. McLeod should have with Dr. Clark's daughter.

A. LEGAL ISSUES

1. Is the *Joint Custody Order* issued by this Court void for lack of subject matter jurisdiction?
2. Does *Troxel v. Granville* require the Court to defer to Dr. Clark's decisions regarding the care, custody and control of her daughter?

B. STATEMENT OF UNDISPUTED FACTS

1. The minor child of this action is E.L.M.C.

2. Dr. Clark is the legal parent of the minor child of this action, E.L.M.C., born on November 12, 1994.
3. E.L.M.C. was born in China and was adopted by Dr. Clark on May 4, 1995.
4. Dr. Clark's foreign adoption was domesticated in Colorado on July 11, 1995.
5. The parties sought and received an Order granting them joint custody of E.L.M.C. on March 25, 1996.
6. "McLeod" is not the child's last name, nor is her last name a hyphenated version of McLeod-Clark. "McLeod" is an additional middle name for the child.
7. Dr. Clark is a fit parent.
8. Dr. McLeod is not a legal parent of the minor child. In addition, Dr. McLeod has never declared the child as a dependent for medical or dental benefits, does not participate in future education planning or financing for the child, and did not participate in the costs, planning or execution of the child's adoption.

II. VALIDITY OF THE JOINT CUSTODY ORDER

A fundamental tenet of our legal system is that a Court may only issue an order affecting an issue at controversy. Without such a controversy, the Court lacks subject matter jurisdiction rendering any orders void.

A. THE JOINT CUSTODY ORDER IS VOID AS THERE WAS NO ISSUE AT CONTROVERSY

The parties' attempt to obtain a joint custody order was effectively a request for a declaratory judgment. A declaratory judgment action must be based on an actual controversy. *New Hampshire Insurance Company v. Constitution Associates,* 908 P.2d 1163, 1165 (Colo. App. 1995) *reh. denied* August 3, 1995, *cert. granted* 1996. Where there is no live

controversy between the parties, the trial court lacks subject matter jurisdiction. *Robertson v. Westminster Mall Company,* 2000 WL 1228775 at * 5 (Colo. App. 2000) (subject matter jurisdiction was not present when plaintiffs sought an injunction against a policy that was never enforced by defendants – as there was no real dispute between the parties, there was no subject matter jurisdiction).

Subject matter jurisdiction grants a court authority to act. Parties to an action cannot confer subject matter jurisdiction upon the Court by agreement or request. *Constitution,* 908 P.2d at 1166. Such a holding is relevant to this action because the parties' joint petition did not confer subject matter jurisdiction upon the Court and thus the *Joint Custody Order* is void.

The Colorado Constitutional requirements for standing, and hence the exercise of the judicial power of government, are set forth in the two-step test established by *Wimberly v. Ettttenberg,* 570 P.2d 535,539 (Colo. 1977) (hereinafter the *"Wimberly"* test). This test is satisfied if: (1) the plaintiff was injured in fact; and (2) that injury was to a legal right protected by statutory provisions which allegedly have been violated. *Romer v. Board of County Commissioners of the County of Pueblo,* 956 P.2d 566 (Colo. 1998), *as modified on denial of rehearing April 27, 1998; Colorado Dept. of Public Health and Envt. v. Caulk,* 969 P.2d 804 (Colo. App. 1998) (to determine whether a party has standing, a Court must inquire whether the plaintiff has suffered injury in fact to a legally protected interest as contemplated by statutory or Constitutional provisions); *see also* COLORADO CONST. Art. 6 § 1.

The injury-in-fact requirement for standing is derived from the state Constitutional limitation on judicial power requiting the presence of an actual controversy, which is demonstrated by a real injury. *Romer,* 956 P.2d 566; *see also Colorado General Assembly v. Lamm,* 700 P.2d 508, 516 (Colo. 1985) (standing necessary to invoke a Court's jurisdiction requires a demonstratable action that has caused or threatens to cause injury to an interest protected by law). The second step requires that a plaintiff show that its interest is derived from a recognized legal interest, such as a statute, creating a "legally cognizable interest that is concrete and particularized." *Romer* at 573 (citations omitted).

"For litigation there must be a controversy, and for a controversy there must be **adverse parties**. Thus, generally, it is indispensable that there be a named plaintiff and a named defendant in order for a trial court to have subject matter jurisdiction." *Jenkins v. Estate of Thomas,* 800 P.2d 1358 (Colo. App. 1990) (emphasis added). As the parties in this action were not adverse at the time of the joint custody proceeding, there was no controversy giving the Court subject matter jurisdiction. When a Motion to Dismiss or to vacate a judgment is made pursuant to C.R.C.P. 60(b)(3), the only issue before the Court is whether it had jurisdiction to enter the original order. *In re the Marriage of Stroud,* 631 P.2d 168 (Colo. 1981). The judgment is either void or not and relief must be afforded accordingly. *Id.* As there was no injury in fact which the *Joint Custody Order* sought to relieve, there was no actual controversy. Therefore, the first prong of the *Wimberly* test is not met.

As to the second prong, Colorado does not grant same sex domestic partners the same status as heterosexual married partners. Such a relationship may not be formally recognized

through a legal marriage[1], and same sex couples cannot legally be co-parents of a child. *In the Matter of the Adoption of T.K.J. and K.A.K.*, 931 P.2d 488 (Colo. App. 1996), *cert denied* Jan. 21, 1997[2]. Though Colorado has previously recognized the rights of psychological parents to initiate actions for parental responsibility, such cases must now be reevaluated in light of *Troxel*. (*See* IV below). Regardless, the issue was not ripe at the time of the *Petition for Joint Custody* as there was no issue in controversy. Because Dr. McLeod did not have a legally cognizable interest to protect, when she initiated the *Petition for Joint Custody,* the second prong of the *Wimberly* test also fails and the order is thus void.

Pursuant to C.R.C.P. 60(b)(3) a Court's order may be set aside at any time if the judgment is void. C.R.C.P. 60(b)(3). Where a Court lacks subject matter jurisdiction over a controversy, any resulting judgment is void as a matter of law. *In re the Marriage of Stroud,* 631 P.2d 168 (Colo. 1981). In *Stroud,* Wife made an oral post-decree motion to modify a division of property that had been previously incorporated into the Court's Decree of Dissolution of Marriage. *Id.* The trial court granted Wife's motion and Husband appealed, asserting the judgment was void due to the lack of subject matter jurisdiction. *Id.* The Colorado Supreme Court acknowledged that a "judgment rendered without jurisdiction is void and may be attacked directly or collaterally." *Id.* at 170. The Court further stated that "[i]t is

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[1] "[A] marriage is valid in this state if: (b) it is only between one man and one woman." C.R.S. § 14-2-104(I)(b).

[2] In *T.K.J.*, lesbian domestic partners petitioned the Court to adopt each others' biological children. The Court found that the children were not *available* for adoption, and that the parties did not meet the limited exception of a step-parent adoption,

not sufficient that the Court has, in the abstract, the authority to decide the particular class of case which is before it. The Court's authority must be invoked before it can act."[3] *Id.* at 171.

This Court clearly has jurisdiction over the class of cases affecting custody (parental responsibility) orders, yet before such authority can be invoked,, there must be an issue at controversy. An actual controversy is an essential requisite to jurisdiction. A Court has no jurisdiction to render an advisory opinion on a controversy that is not yet ripe, or to decide a case on a speculative, hypothetical, or contingent set of facts. *Robertson* at * 5. The *Joint Custody Order* is thus void as it was not based on an actual controversy and, at best, was based on a set of speculative, hypothetical, or contingent facts.

B. SUBJECT MATTER JURISDICTION MAY BE RAISED AT ANY TIME

C.R.C.P. 60 sets forth the time limits on a party's ability to request relief from a Court's order. The Court, or any party, may, at any time, challenge a judgment as void due to the Court's lack of subject matter jurisdiction. C.R.C.P. 60(b)(3). *In re the Marriage of Pierce,* 720 P.2d 591 (Colo. App. 1985) (A void judgment is a nullity); *In re the Marriage of Stroud,* 631 P.2d 168 (Colo. 1981) (Judgment rendered without jurisdiction is void and may be attacked directly or collaterally). The absence of subject matter jurisdiction may be raised at any stage of the proceedings. *Paine, Webber,*

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[3] The Court in *Stroud* affirmed the lower court's ruling by finding that the trial court had subject matter jurisdiction under C.R.C.P. 60(b)(4) and (5).

Jackson & Curtis v. Adams, 718 P.2d 508, 513 (Colo. 1986); *Don J. Best Trust v. Cherry Creek Nat. Bank,* 792 P.2d 302 (Colo. App. 1990) (Void Judgment may be vacated at any time); *In re the Marriage of Finer,* 893 P.2d 1381, 1384 (Colo. App. 1995) (court's subject matter jurisdiction cannot be waived and can be raised at any time); *Caulk,* 969 P.2d 804. The test of whether the Court has subject matter jurisdiction over a particular controversy depends upon the competency of the Court to determine controversies of the general class that are presented for its consideration. *Stone's Farm Supply, Inc. v. S.G. Decon,* 805 P.2d 1109 (Colo. 1991). As the Court lacked subject matter jurisdiction, the *Joint Custody Order* is void.

III. *TROXEL V. GRANVILLE*

A. ANALYSIS OF TROXEL V. GRANVILLE

In Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054 (2000), the United States Supreme Court acknowledged that parents have certain fundamental rights that should not be abridged by the states. The key principals found in *Troxel are* that fit parents are presumed to act in their child's best interest and that the State should not impose its own views of the child's best interest over that of the parents.

The Troxel decision originated when grandparents of children born out of wedlock petitioned the Washington state court for visitation with their deceased son's children. The children's mother objected to the amount of visitation that was requested, but did provide a schedule of ongoing contact with the non-parents. The trial court granted the grandparent's request for visitation under Washington's non-parent visitation statute:

> Any person may petition the court for visitation rights at any time including, but not limited to custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.

Wash. Rev. Code § 26.10.160(3) (1994).

The appellate court reversed the trial court, finding that Washington's non-parent visitation statute did not apply unless there was an existing custody proceeding. *Troxel* at 2058. The Washington Supreme Court affirmed the appellate decision for other reasons. *Id.* The Washington Supreme Court held that the Washington statute on its face did not require a pre-existing custody proceeding. *Id.* The Court first noted that the United States Constitution only permits a State to interfere with the right of parents to rear their children to prevent harm or potential harm to a child. *Id.* Second, the Court noted that its statute was overly broad as it allowed any person to seek visitation so long as such contact was in the child's best interest. The Court held that "parents have a right to limit visitation of their children with third persons, and that between parents and judges, the parents should be the ones to choose whether to expose their children to certain people or ideas." *Id.* at 2059 (citations omitted). Certiorari was granted to the United States Supreme Court.

The 6-3 *Troxel* opinion contains a plurality opinion (four justices), two concurring opinions and three dissenting opinions[4].

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[4] *Troxel* Dissents: **Stevens**: Justice Stevens believed the Court should not have granted certiorari as the interpretation of the Washington statute was a uniquely Washington issue. Stevens

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agreed with the Plurality's acknowledgement of the parent's fundamental rights. However, he noted that the fundamental rights of the child and the State's interest in the child's welfare place limitations on the parent's rights. *Troxel,* 530 U.S. at 2072. Though there are no decisions on point, Stevens suggested that the child's right to preserve contact with non-parents must be balanced against the parent's determinations (with the parent's wishes bearing more weight). *Id.* Stevens also bases his comments on the distinction of invalidating a statute on its face as opposed to as it is applied. Stevens believed that the Washington Supreme Court failed to properly apply the Federal Constitution and failed to give any content to the term "best interest." Stevens would have reversed and remanded with instructions. *Troxel,* 530 U.S. at 2070.

Scalia: Though he recognizes that the right to rear one's children is an inalienable right recognized by the Declaration of Independence, Scalia notes that such a *right* is not mentioned in the Constitution. *Id.* at 2074. In his opinion, he as a judge is not authorized to deny the legal effect of a law that infringes on an unenumerated right, *Id.* Scalia also notes that the existence of this *right* is only mentioned in three holdings of this Court (which have been repudiated) and thus the *right* has small claim to *stare decisis* protection, *Id. As* he does not believe the *right* exists, and does not believe it appropriate to establish such a *right,* Scalia would reverse the judgment, *Id.* at 2075.

Kennedy: Justice Kennedy disagreed with the Washington Supreme Court's finding that its statute was unconstitutional because it failed to require proof that the denial of third party visitation would harm the child, *Id.* As Kennedy saw this as error, he would have remanded for the Washington Supreme Court to reconsider this issue.

1. Plurality Opinion (Justice O'Connor, Rehnquist, Ginsburg and Breyer)

The Plurality begins by acknowledging that because third parties (non-parents) have increasingly undertaken parental duties, many states have sought to protect the relationships of such parties with the affected children. *Id.* The Plurality, however, continues by recognizing that the "Fourteenth Amendment provides that no State shall 'deprive any person of life, liberty, or property, without due process of law.'" *Id.* "The Clause also includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests" including a parent's fundamental right to make decisions concerning the care, custody, and control of their children. *Id.* at 2060.

The Washington statute was held unconstitutional because it infringed on a parents fundamental right to make decisions for their children and placed the best-interest determination solely in the hands of the Court. *Id.* at 2061. The concern noted by the United States Supreme Court that is relevant to the case at issue is this: Colorado's non-parent visitation statute allows a Court to disregard and overturn any decision by a fit parent concerning their child's contact with a third party based solely on the judge's determination of the child's best interest. *Id.* In this case, Dr. Clark, the legal parent, is a fit parent and the Court, by not deferring to her decisions, would be imposing its own determination of the child's best interest.

Of special importance to the Court was the fact that Granville was willing to provide a schedule of contact with the non-parents that she felt was in her children's best interest and the trial court failed to give that determination any special

weight. *Id.* at 2062. In the case at issue, Dr. Clark is willing to provide a schedule of *significant* contact between her daughter and Dr. McLeod that differs from that requested by Dr. McLeod. Dr. Clark has never taken the position that contact should be eliminated; only that such contact should be limited based on her determination of a schedule that is in her child's best interest.

The Plurality was also concerned that the trial court placed the burden on the parent to disprove that visitation with the non-parent was in the children's best interest, *Id.* The Court restated the presumption that a fit parent acts in their child's best interest. *Id.* (*Citing Parham v. J.R.*, 99 S.Ct. 2493 (1979)). The trial court's shifting of the burden to the fit parent fails to provide any protection for the fit parent's fundamental Constitutional right to make decisions for their children. *Troxel* at 2062. This same burden shifting has also occurred in this case. Rather than requiting Dr. McLeod to prove that the denial of her requested contact would cause harm, the Court has requested Dr. Clark to prove that contact with Dr. McLeod is not in the child's best interest.

After determining that Washington's statute was too broad and that it impermissibly substituted the Court's determination of the child' s best interest in place of the fit parent, the Court affirmed the decision of the Washington Supreme Court, holding that the Washington statute was unconstitutional. *Id.* at 2064. Because it held that the statute itself was unconstitutional, the Plurality did not consider the question of whether the non-parent would actually be required to demonstrate harm or potential harm in order to obtain visitation rights. *Id.*

2. Souter's Concurring Opinion

The Washington Supreme Court held that the statute was unconstitutional because: 1) it failed to require the non-parent to establish that harm would occur as a prerequisite to visitation; and 2) the statute allowed anyone, including non-relatives, to seek a visitation order. *Id.* at 2066. Justice Souter agreed with the second point addressed by the Washington State Supreme Court and concluded there was no need for the Court to proceed with any further analysis. *Id.*

3. Thomas' Concurring Opinion

Justice Thomas agreed with the Plurality that a parent's fundamental right to make decisions for their children resolves the case. *Id.* at 2068. Justice Thomas, however, went further and concluded that strict scrutiny is the appropriate standard of review to be used by a Court when making decisions infringing on a parent's fundamental rights. Essentially, he would add the requirement that the non-parent establish that harm would occur if the requested contact was not granted.

B. THE TROXEL TEST

In analyzing the *Troxel* decision, certain principles emerge that must be applied to any third parties' request for visitation over the legal parent's objection.

1. A fit parent is presumed to act in their child's best interest.

2. The Court should not disregard a fit parent's determination in favor of its own determination of the child's best interest.

3. The fact that the parent is willing to provide some contact must be recognized and the parent's schedule must be given deference.

4. The Court cannot shift the burden to the parent to disprove that contact with the non-parent is in the child's best interest.

Applying this *Troxel* Test to this case the Court must find that:

1. Dr. Clark is a fit parent who will act in her daughter's best interest.

2. The Court must defer to Dr. Clark's determination of what is in her daughter's best interest.

3. Dr. Clark's proposed visitation schedule for Dr. McLeod must be given significant weight.

4. The Court cannot shift the burden of proof to Dr. Clark to disprove that the requested schedule of contact between the child and Dr. McLeod is in the child's best interest.

C. COLORADO'S PRE-TROXEL DECISIONS

Various pre-*Troxel* cases have found that third parties (non-parents) *had* certain recognizable rights to custody and visitation. Any cases which involved a fit legal parent who had physical custody of the child have now been overruled by *Troxel*. The Colorado cases discussed below can be reconciled with *Troxel* in that the various Courts have inserted "harm" as an element of the best interest test. Such cases found that actual harm would result if the child was *returned* to a parent

and taken away from the non-parent. This addition of the "harm" element was discussed in Justice Thomas' concurring *Troxel* opinion (III.A.3 above) and has been adopted by the Supreme Court of other states (III. E below). Where the child was not in the care of a fit legal parent, the pre-*Troxel* cases add actual harm as a required element prior to the establishment of parental rights in the non-parent.

One of the first Colorado cases to recognize the concept of a psychological parent was *Root v. Allen,* 377 P.2d 117 (Colo. 1962). In *Root,* Father and Mother divorced, and Mother was granted custody. Mother remarried and Father had limited contact with the child for a number of years. After Mother's death, the Court awarded custody of the child to the step-father. The Court held that even though a parent is a fit and proper person to have custody of a child, determination of custody is ultimately made in the child's best interest. The presumption that a child's welfare is best served through custody of the legal parent is rebuttable, and thus where the evidence establishes that the welfare of the child will not be promoted by the parent's custody, such custody will not be granted. The Court in *Root* specifically found that Father's home was not suitable, and that the new step-mother had her own problems. In essence, the Court added the "harm" element not discussed in *Troxel* - that in order to deviate from the legal parent's determination of the child's best interest, the Court had to find that actual harm would result to the child if she was not placed in the non-parent's custody.

Where the non-parent has played a joint role in raising the child, Colorado Courts have recognized the existence of a psychological parentage that places the non-parent on equal footing with the parent. *In re the Marriage of Dureno,* 854 P.2d 1352 (Colo.App. 1993). In *Dureno,* Mother alleged and proved at the time of the parties' dissolution of marriage

proceeding that Husband was not the child's biological father. The Court held visitation rights may be awarded to a non-parent under some limited circumstances. The Court also noted that the right to visitation is derived from a right to custody and is governed by the same legal principles. As Husband had legal standing to seek custody of the child based on his term of continuous residency with the child, he had the right to seek visitation with the child. The Court stated it may grant visitation privileges to a step-parent or surrogate parent under the following conditions: (1) the non-parent is jurisdictionally capable of litigating custody under C.R.S. § 14-10-123 (1); (2) the non-parent has acted in a custodial and parental capacity toward the minor child and visitation would be in the child's best interest.

In order to determine whether, and to what extent, to grant non-parent visitation, the trial court should be guided by the statutory factors set forth in the best interest standard under C.R.S. § 14-10-124. In addition, however, the Court must under *Troxel* consider the wishes of the child's natural parent, the child's age, the nature and length of the relationship between the child and the non-parent, and the extent to which the child's well-being will be served by granting visitation to the non-parent.

The application of *Troxel* to *Dureno* would acknowledge that the child should have continued contact with the Husband, but that the Mother had a fundamental right to set the visitation schedule as she deemed appropriate. The Court must give Mother's schedule appropriate deference.

Custody of C.C.R.S., 892 P.2d 246 (Colo. 1995), dealt with a custody dispute between a parent who had never cared for the child and the non-parents who had cared for the child for 41/2 years in anticipation of adoption. Here, the Court

held that the non-parents were entitled to seek custody and were not required to demonstrate parental unfitness as a prerequisite to an award of custody. The Court ruled that the appropriate standard was the best interest test so long as the parent's rights were not subject to full, final and irrevocable severance.

In disputes between parents and non-parents, Colorado Courts recognize the presumption that the natural parent has the first and prior right to custody. This presumption, however, may be rebutted by evidence establishing that a child's best interests are served by granting custody to the non-parent.

In his dissent, Justice Lohr anticipated the *Troxel* decision and asserted that parents have a fundamental Constitutional right to the care and custody of their children. A Court should not be able to deprive parents of the custody of their children and award custody to a non-parent without a finding that the parent is at least unfit in the absence of a compelling reason. Justice Scott held that the non-parents lacked standing to proceed as the mere "possession" of a child does not equate to "physical custody."

The *C.C.R.S.* decision again appears to apply the requirement that demonstratable harm would occur if custody and/or visitation were not granted to the non-parent. It is important to note that the amount of time the child remained in the non-parents care (and out of the parent's care) before a final decision played a significant factor in the court's determination that harm would occur.

In re the Custody of A.D.C., 969 P.2d 708 (Colo.App. 1998) is a case involving Grandparents who received custody even though their daughter maintained contact with the child.

The Court held that a non-parent does not have to demonstrate by clear and convincing evidence that he or she has become the psychological parent. Once a non-parent establishes standing, the Court will consider that person's custody claim based on the best interest of the child standard. The trial court found that Mother, while not unfit, had been irresponsible in the care of the child, was immature, denied any responsibility for her own situation, has led a nomadic lifestyle and had left the child in the custody of others, had abandoned the child for a period, and was not capable of providing a structured and stable environment. Again, the existence of harm played a major role in the Court's decision.

Where Colorado cases recognize the rights of psychological parents, they almost uniformly also find the existence of demonstratable harm that would occur if the relationship with the non-parent is not maintained. Reconciling these cases with *Troxel* requires the Court to defer to the parent's determination of contact with the non-parent, if contact is provided, and so long as harm is not established.

D. COLORADO'S POST TROXEL DECISIONS

The application of *Troxel* to Colorado's statutes has not yet been addressed by our appellate courts. To date, *Troxel* has only been mentioned in two Colorado appellate cases, neither of which directly related to this matter, but both of which reassert the fundamental right of a parent to choose the manner in which their child is raised.

Cooper v. United States Ski Association, 2000 WL 1159066 (Colo.App. 2000), *rehearing denied,* Oct. 12, 2000, was a personal injury suit initiated by Father on behalf of his son against the United States Ski Association. Of relevance to

Troxel, Mother had signed a release on her child's behalf. The Court found that the release signed by Mother was enforceable and cited *Troxel* in support of the positions that a parent has a fundamental right under the Due Process Clause to make decisions concerning the care, custody, and control of their children, and that parents have a fundamental liberty interest in the rearing of their children. In *Cooper,* because the parent had the right to make decisions on behalf of her minor child, a release signed by the parent controls over the child's right to initiate litigation contemplated by the release.

L.L. v. People, 10 P.3d 1271 (Colo. 2000), was a dependency and neglect action in which the minor child was placed in custody of the State. Though the Court eliminated all of the parent's parenting time with the child and a majority of her parental responsibility, the Court left certain rights under the parent's control. The appellate court recognized that parents possess a right to the companionship, care, custody, and management of their children, and a fundamental Constitutional right to maintain family relationships free from governmental interference. As such, the government must meet certain due process and equal protection standards before these Constitutional rights can be extinguished. Clear and convincing evidence is necessary to find in support of a total termination of parental rights. However, as the Court did not divest the parent of all of her rights (her parental rights were not terminated), the Court held that the trial court decision could be based on the lower preponderance of the evidence standard.

Though neither *L.L.* or *Cooper* shed much light on the application of *Troxel* to the case at issue, it is important to note that both reaffirm the parent's fundamental right under the Due Process Clause of the United States Constitution to

make decisions regarding the care, custody and control of their children.

In the current case, Dr. Clark is the sole parent and thus it must be recognized that she has a fundamental right to make decisions regarding the care, custody and control of her child. *Troxel,* 120 S.Ct. 2054.

E. NATIONAL TROXEL DECISIONS

Following the *Troxel* decision, many other states have invalidated or restricted their third party visitation statutes to provide for appropriate deference to the parent's determinations. In *Punsly v. Ho,* 87 Cal.App.4th 1099, 105 Cal.Rptr.2d 139 (Cal.App. 2001), paternal grandparents sought visitation with their grandchildren after the death of their son. Visitation began and later was restricted. The trial court ordered visitation over Mother's objection even though Mother offered to allow contact on a more limited basis than was requested. In *Punsly,* as in *Troxel,* there were no allegations that the parent was unfit. The appellate court noted that the State's recognition of an independent third-party interest in a child places a substantial burden on the traditional parent-child relationship. In discussing the breadth of the Washington statute, the Court noted that under such statute, a Washington court could, in effect, disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interest. The Court noted the three key *Troxel* facts which were: 1) Mother was fit and proper person to have custody; 2) the Court gave no special weight to parent's determination of child's bests interests; and 3) the Court failed to give weight to a voluntary offer of visitation. In analyzing *Punsly, the* Court agreed that the Due Process

Clause does not permit a State to infringe on the fundamental right of parents to make child-rearing decisions simply because a state judge believes a "better" decision could be made.

As part of this decision, the Court analyzed a contrary decision out of Missouri, *In re G.P.C.,* 28 S.W.3d 357 (Mo.App. 2000). In *G.P.C.* the Missouri appellate court held that its third party visitation statute did not violate *Troxel* as its statute only applied to grandparent visitation and did not allow the Court complete and independent authority to overrule the parent's determinations. As the Missouri statute authorized the trial court to appoint a GAL, the appellate court ruled that the trial judges determination would be based on more than just its own view of the child's best interest.

The *Punsly* Court noted that the California statute has similar provisions restricting the class of people who could seek visitation, but noted that such a distinction was not the basis of the *Troxel* decision. The Court stated that *Troxel* was based on the fact that the statute authorized third party visitation solely on the Court's finding that such visitation is in the child's best interest. It is when the Court exercises this discretion to substitute its own judgment of a child's best interests for that of a competent custodial parent that a parent's fundamental rights are threatened.

Colorado's statutes also allow the Court to appoint a G.A.L. - Special Advocate or Special Representative - or even a custody evaluator. However these professionals are only authorized to make a report to the Court. C.R.S. § 14-10-116 and C.R.S. § 14-10-127. The Court cannot delegate such decisions and ultimately we still have a jurist imposing their determination of the child's best interest over a fit parent's objections. The *Troxel* decision stands for the position that an

order of non-parental visitation, issued over the objection of a competent parent, does not withstand a Constitutional due process challenge based on alleged infringement of a parent's fundamental rights, especially when the Court ignores a parent's voluntary efforts to arrange visitation and effectively places a burden on a parent to disprove a presumption that non-parental visitation is in his or her child's best interests.

In Guardianship of Olivia J., 84 Cal.App.4th 1146, 101 Cal.Rptr.2d 364 (Cal.App. 2000), California also found that a third party must establish harm from the denial of contact prior to receiving visitation or custody. In *Olivia J.*, a former domestic partner filed a petition for guardianship of the former partner's biological child. The trial court dismissed the former partner's petition based on her status as a non-parent holding that, in the absence of an allegation of abuse, neglect or abandonment, a non-parent could not, as a matter of law, establish that parental custody was detrimental to the child. The Court further held that a finding of detriment could not be based upon a showing that the natural parent is depriving the child of a relationship with another non-parent.[5]

In *Clark v. Wade*, 544 S.E.2d 99 (Ga. 2001), the Georgia Supreme Court reviewed two cases involving custody disputes between non-custodial fathers and custodial grandparents. In both cases the trial court granted custody to the non-custodial fathers, even after finding that the best interest of the child was served by custody with grandparents. The trial court struck down Georgia's "best interest" statute as unconstitutional.

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[5] They noted that dismissal was improper without a hearing on the merits because the petition alleged that parental custody was harmful.

The Georgia statute at issue provides that a third party may gain custody over a parent if that third party can overcome three presumptions: 1) a parent is a person entitled to custody; 2) a fit parent acts in the best interest of his or her child; and 3) the child's best interest is to be in the custody of a parent. Such a test would appear to provide adequate protection for the parent's rights and their relationship with their children. However, the Georgia statute also provides that these rebuttable presumptions may be overcome by a showing that custody with a third party is in the child's best interest.

In reconciling *Troxel* with the Georgia statute, the Court construed its custody statute as requiring the third party to show, by clear and convincing evidence, that parental custody would harm the child in order to rebut the statutory presumption in favor of the parent. With this narrowing construction, the Georgia Court found its statute to be Constitutional.

As in Colorado, the Georgia statute limits the class of individuals who may petition for custody. Georgia's statute goes further than Colorado's by establishing a rebuttable presumption in favor of parental custody. The Georgia Court noted that this leaves the Court with a best interest test that can be used to overcome a fit parent's wishes. Though not discussed in the *Troxel* plurality, the Georgia Court appears to have agreed with Justice Thomas' concurring opinion requiring a demonstration that parental custody would **harm** the child in order to rebut the statutory presumption in favor of the parent. Once this presumption is overcome, the third party must show that an award of custody to him or her will best promote the child's health, welfare and happiness. The Georgia Court defined "harm" as either physical harm or significant, long-term emotional harm.

In another fact pattern almost identical to *Troxel,* the Kansas Supreme Court ruled that application of its grandparent visitation statute violated fundamental Constitutional rights as it shifted the burden to the parent to disprove that visitation would serve the child's best interest. *State Dep't of Social and Rehab. Svcs. V. Paillet,* 16 P.3d 962 (Kan. 2001). As in Colorado, the Kansas statute only required that the non-parent establish 1)the existence of a substantial relationship with the child; and 2) that visitation was in the child's best interest. The Kansas Court noted that under *Troxel,* the Due Process Clause places the burden of proof squarely on the party seeking visitation to show that it would be in the child's best interest and that the trial court must accept the presumption that a fit parent will act in a child's best interest.

Maryland applied *Troxel* in *Brice v. Brice,* 754 A.2d 1132 (Md.App. 2000). With facts very similar to *Troxel,* paternal grandparents sought visitation after their son's death. Mother objected to the amount of time requested. The Maryland Court held that even though its statute is narrower than Washingtons (it applied only to grandparents), the statute still violated *Troxel. The Brice* Court acknowledged that visitation over a parent's objection was an inappropriate violation of fundamental parental rights.

A few *post-Troxel* cases have held that visitation over the parent's objection was not violative of *Troxel* due to existing custody or visitation orders. In *Scott v. Scott,* 19 P.3d 273 (Okla. 2001), following a step-parent adoption, the parents sought to terminate grandparent visitation. The Court denied the parent's request. The Oklahoma Supreme Court remanded the case for a hearing to determine the child's best interest, distinguishing *Troxel* because there was already an established order for visitation with the Grandparents. Under Okalahoma

law, a party seeking to modify a visitation order has the burden of proof to demonstrate a change in circumstances which adversely affects the best interest of the child such that the temporal, moral and mental welfare of the child would be improved by the change.

Similarly, in *Rubano v. DiCenzo,* 759 A.2d 959 (R.I. 2000), the Court refused to restrict parenting time for a former domestic partner based on a previous Court order establishing a stipulated visitation schedule between the parties. In *Rubano,* the former domestic partner filed a petition to enforce a written agreement for parenting time. Following a previous petition, the parties entered into a Court-approved stipulation for permanent parenting time that they stated was in the child's best interest. The Rhode Island Supreme Court noted that the Family Court had jurisdiction to determine the existence of a *de facto* mother-child relationship. The *Rubano* majority distinguished itself from *Troxel* by noting that its third party statute only applies to parties with a parent-like relationship to a child. The dissent argued that the majority misapplied *Troxel* by failing to defer to the fit parent's determination in light of an existing offer for contact at a schedule less than that requested by the non-parent.

The distinguishing characteristic between the case before this Court and *Rubano* is that Dr. Clark never agreed that the level of contact requested by Dr. McLeod is in her daughter's best interest. In *Rubano,* the parent originally agreed that it was in her child's best interest to have a set schedule of contact with her former domestic partner, and then later sought to further restrict that time. When the *Joint Custody Order* was obtained *(see supra,* II.A for a discussion that such order is void for lack of subject matter jurisdiction), there was no discussion that upon a termination of the domestic

partnership that it would be in the child's best interest to spend equal time with both parties. The Court's file is clear that the intent of the document was to provide for the child if something were to happen to her mother, Dr. Clark, and to insure there would be ongoing contact between the child and Dr. McLeod. Again, Dr. Clark is agreeable to contact between her daughter and Dr. McLeod based on a schedule that Dr. Clark has determined to be in the child's best interest. As Dr. Clark is a fit parent and has proposed an appropriate level of contact between her daughter and Dr. McLeod, the Court must defer to Dr. Clark's determinations regarding her daughter's best interest. *Troxel,* 120 S.Ct. 2054.

IV. APPLICATION OF *TROXEL* TO COLORADO

Colorado's third party custody and visitation statutes are more restrictive than the Washington statute. However, the final decision in Colorado still rests on the Court's determination of the child's best interest. C.R.S. § 14-10-124. As instructed by *Troxel,* where the parent is a fit individual, the Court must presume that the parent is acting in the child's best interest and must also defer to that parent's determination of the child's best interest. The Court must also require the non-parent to prove that the failure to provide her with the requested contact would not be in the child's best interest and not switch the burden of proof to the parent.

The clearest way to reconcile *Troxel* with Colorado's statutes is to require the non-parent to establish that the child would be harmed if the contact requested by the non-parent were not-granted. *(See Punsly supra).* This would allow the Court to defer to the parent's determination unless the Court found that actual harm would occur.

V. CONCLUSION

Dr. Clark is the child's only parent and as the *Joint Custody Order* is void, the child's only legal custodian. *Troxel's* impact on Colorado law requires this Court to defer to Dr. Clark's determination of best interest and defer to her determination of an appropriate visitation schedule.

WHEREFORE, Dr. Clark respectfully requests that this Court enter the following orders:

1: Vacate the *Joint Custody Order* due to the lack of subject matter jurisdiction;

2: Dismiss Dr. McLeod's *Motion for Parenting Time* for lack of standing and jurisdiction; and

3: Acknowledge Dr. Clark's fundamental right to make decisions regarding the care, custody and control of her daughter; defer to Dr. Clark's decisions regarding the best interest of her daughter and the amount of her daughter's contact with Dr. McLeod.

By: /s/ _____
Jordan M. Fox (No. 23971)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **TRIAL BRIEF: 1) VALIDITY OF JOINT CUSTODY ORDER; 2) IMPLICATION OF *TROXEL vs. GRANVILLE*** was duly served upon the following by depositing same in the U.S. Mail, postage prepaid, this 1st day of June, 2001:

Gina B. Weitzenkorn (No. 7170)
Attorney for Co-Petitioner ELSEY MAXWELL MCLEOD
MILLS & WEITZENKORN, P.C.
1441 18th Street, Suite 150
Denver, Colorado 80202
Telephone: (303) 292-1441
Facsimile: (303) 292-1126
E-mail: gbw@mwlawpc.com

By: /s/ _____
K. Marshall

APPENDIX J

DISTRICT COURT,
DENVER, COLORADO
Denver City and County Building
1437 Bannock Street, Room 256
Denver Colorado 80202
Telephone: (303) 640-2491

Case Number 96 DR 39
Courtroom 21

In re the Custody and Support of:	)
	)
E.L.M.C.,	)
minor child,	)
	)
and concerning	)
	)
CHERYL ANN CLARK and ELSEY MAXWELL McLEOD, Co-Petitioners.	)
	)

Attorney or Party Without Attorney (Name and Address):
Jordan M. Fox, Esq.
Attorneys for Co-Petitioner CHERYL A. CLARK
CAGE & NORTH, P.C.
1433 17th Street
Denver, Colorado 80202
Phone Number: (303) 295-0202
FAX Number: (303) 296-7403
E-mail: jfox@cagenorth.com

Atty. Reg. # 23971

TRIAL BRIEF: *TROXEL vs. GRANVILLE*

Co-Petitioner, Cheryl A. Clark, M.D., hereby files this Trial Brief in support of her Motion for Review of the Magistrate' s Order of July 10th, 2001. This brief discusses the appropriate legal standard to be used in parenting disputes between legal parents and third parties in light of the United State Supreme Court's decision in *Troxel v. Granville,* 530 U.S. 57, 120 S.Ct. 2054 (2000).

I. DISCUSSION

A. THE TROXEL DECISION:

In *Troxel v. Granville,* 530 U.S. 57, 120 S.Ct. 2054 (2000), the United States Supreme Court acknowledged that parents have certain fundamental rights that should not be abridged by the states. The key principals found in *Troxel* are that fit parents are presumed to act in their child's best interest and that the State should not impose its own views of the child's best interest over that of the parents.

The Troxel decision originated when grandparents of children born out of wedlock petitioned the Washington state court for visitation with their deceased son's children. The children's mother objected to the amount of visitation that was requested, but did provide a schedule of ongoing contact with the non-parents. The trial court granted the grandparent's request for visitation under Washington's non-parent visitation statute:

> Any person may petition the court for visitation rights at any time including, but not limited to custody

> proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.

Wash. Rev. Code § 26.10.160(3)(1994).

The appellate court reversed the trial court, finding that Washington's non-parent visitation statute did not apply unless there was an existing custody proceeding. *Troxel* at 2058. The Washington Supreme Court affirmed the appellate decision for other reasons. *Id.* The Washington Supreme Court held that the Washington statute on its face did not require a preexisting custody proceeding. *Id.* The Court first noted that the United States Constitution only permits a State to interfere with the right of parents to rear their children to prevent harm or potential harm to a child. *Id.* Second, the Court noted that its statute was overly broad as it allowed any person to seek visitation so long as such contact was in the child's best interest. The Court held that "parents have a right to limit visitation of their children with third persons, and that between parents and judges, the parents should be the ones to choose whether to expose their children to certain people or ideas." *Id.* at 2059 (citations omitted). Certiorari was granted to the United States Supreme Court.

The 6-3 *Troxel* opinion contains a plurality opinion (four justices), two concurring opinions and three dissenting opinions[1].

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[1] *Troxel* Dissents: **Stevens**: Justice Stevens believed the Court should not have granted certiorari as the interpretation of the Washington statute was a uniquely Washington issue. Stevens agreed with the Plurality's acknowledgement of the parent's fundamental rights. However, he noted that the fundamental rights

1. Plurality Opinion (Justice O'Connor, Rehnquist, Ginsburg and Breyer)

The Plurality begins by acknowledging that because third parties (non-parents) have increasingly undertaken parental duties, many states have sought to protect the relationships of

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of the child and the State's interest in the child's welfare place limitations on the parent's rights. *Troxel,* 530 U.S. at 2072. Though there are no decisions on point, Stevens suggested that the child's right to preserve contact with non-parents must be balanced against the parent's determinations (with the parent's wishes bearing more weight). *Id.* Stevens also bases his comments on the distinction of invalidating a statute on its face as opposed to as it is applied. Stevens believed that the Washington Supreme Court failed to properly apply the Federal Constitution and failed to give any content to the term "best interest." Stevens would have reversed and remanded with instructions. *Troxel,* 530 U.S. at 2070.

Scalia: Though he recognizes that the right to rear one's children is an inalienable right recognized by the Declaration of Independence, Scalia notes that such a *right* is not mentioned in the Constitution. *Id.* at 2074. In his opinion, he as a judge is not authorized to deny the legal effect of a law that infringes on an unenumerated right. *Id.* Scalia also notes that the existence of this *right* is only mentioned in three holdings of this Court (which have been repudiated) and thus the *right* has small claim to *stare decisis* protection. *Id. As* he does not believe the *right* exists, and does not believe it appropriate to establish such a *right,* Scalia would reverse the judgment. *Id.* at 2075.

Kennedy: Justice Kennedy disagreed with the Washington Supreme Court's finding that its statute was unconstitutional because it failed to require proof that the denial of third party visitation would harm the child. *Id.* As Kennedy saw this as error, he would have remanded for the Washington Supreme Court to reconsider this issue.

such parties with the affected children. *Id.* The Plurality, however, continues by recognizing that the "Fourteenth Amendment provides that no State shall 'deprive any person of life, liberty, or property, without due process of law.'" *Id.* "The Clause also includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests" including a parent's fundamental right to make decisions concerning the care, custody, and control of their children. *Id. at* 2060.

The Washington statute was held unconstitutional because it infringed on a parents fundamental right to make decisions for their children and placed the best-interest determination solely in the hands of the Court. *Id.* at 2061. The concern noted by the United States Supreme Court that is relevant to the case at issue is this: Colorado's non-parent visitation statute allows a Court to disregard and overturn any decision by a fit parent concerning, their child's contact with a third party based solely on the judge's determination of the child's best interest. *Id.* In this case, Dr. Clark, the legal parent, is a fit parent and the Court, by not deferring to her decisions, would be imposing its own determination of the child's best interest.

Of special importance to the Court was the fact that Granville was willing to provide a schedule of contact with the non-parents that she felt was in her children's best interest and the trial court failed to give that determination any special weight. *Id.* at 2062. In the case at issue, Dr. Clark is willing to provide a schedule of ***significant*** contact between her daughter and Dr. McLeod that differs from that requested by Dr. McLeod. Dr. Clark has never taken the position that contact should be eliminated; only that such contact should be

~~limited~~ based on her determination of a schedule that is in her child's best interest.

The Plurality was also concerned that the trial court placed the burden on the parent to disprove that visitation with the non-parent was in the children's best interest. *Id.* The Court restated the presumption that a fit parent acts in their child's best interest. *Id. (citing Parham v. J.R.,* 99 S.Ct. 2493 (1979)). The trial court's shifting of the burden to the fit parent fails to provide any protection for the fit parent's fundamental Constitutional right to make decisions for their children. *Troxel at* 2062. This same burden shifting has also occurred in this case. Rather than requiring Dr. McLeod to prove that the denial of her requested contact would cause harm, the Court has requested Dr. Clark to prove that contact with Dr. McLeod is not in the child's best interest.

After determining that Washington's statute was too broad and that it impermissibly substituted the Court's determination of the child's best interest in place of the fit parent, the Court affirmed the decision of the Washington Supreme Court, holding that the Washington statute was unconstitutional. *Id.* at 2064. Because it held that the statute itself was unconstitutional, the Plurality did not consider the question of whether the non-parent would actually be required to demonstrate harm or potential harm in order to obtain visitation rights. *Id.*

2. Souter's Concurring Opinion

The Washington Supreme Court held that the statute was unconstitutional because: 1) it failed to require the non-parent to establish that harm would occur as a prerequisite to visitation; and 2) the statute allowed anyone, including non-relatives, to seek a visitation order. *Id.* at 2066. Justice Souter

agreed with the second point addressed by the Washington State Supreme Court and concluded there was no need for the Court to proceed with any further analysis. *Id.*

3. Thomas' Concurring Opinion

Justice Thomas agreed with the Plurality that a parent's fundamental right to make decisions for their children resolves the case. *Id.* at 2068. Justice Thomas, however, went further and concluded that strict scrutiny is the appropriate standard of review to be used by a Court when making decisions infringing on a parent's fundamental rights. Essentially, he would add the requirement that the non-parent establish that harm would occur if the requested contact was not granted.

B. THE TROXEL TEST

In analyzing the *Troxel* decision, certain principles emerge that must be applied to any third parties' request for visitation over the legal parent's objection.

1. A fit parent is presumed to act in their child's best interest.

2. The Court should not disregard a fit parent's determination in favor of its own determination of the child's best interest.

3. The fact that the parent is willing to provide some contact must be recognized and the parent's schedule must be given deference.

4. The Court cannot shift the burden to the parent to disprove that contact with the non-parent is in the child's best interest.

Applying this *Troxel* Test to this case the Court must find that:

1. Dr. Clark is a fit parent who will act in her daughter's best interest.

2. The Court must defer to Dr. Clark's determination of what is in her daughter's best interest.

3. Dr. Clark's proposed visitation schedule for Dr. McLeod must be given significant weight.

4. The Court cannot shift the burden of proof to Dr. Clark to disprove that the requested schedule of contact between the child and Dr. McLeod is in the child's best interest.

C. COLORADO'S PRE-TROXEL DECISIONS

Various pre-*Troxel* cases have found that third parties (non-parents) *had* certain recognizable rights to custody and visitation. The cases involving a **fit legal parent with physical custody** of the child have now been overruled by *Troxel*. The Colorado eases discussed below can be reconciled with *Troxel* in that the various Courts have inserted "harm" as an element of the best interest test. Such cases found that actual harm would result if the child was ***returned*** to a parent and taken away from the non-parent. This addition of the "harm" element was discussed in Justice Thomas' concurring *Troxel* opinion (I.A.3 above) and has been adopted by the Supreme Court of other states (I.E below).

One of the first Colorado cases to recognize the concept of a psychological parent was *Root v. Allen,* 377 P.2d 117 (Colo. 1962). In *Root,* Father and Mother divorced, and Mother was granted custody. Mother remarried and Father had limited contact with the child for a number of years. After Mother's death, the Court awarded custody of the child to the step-father. The Court held that even though a parent is a fit and proper person to have custody of a child, determination of custody is ultimately made in the child's best interest. The presumption that a child's welfare is best served through custody of the legal parent is rebuttable, and thus where the evidence establishes that the welfare of the child will not be promoted by the parent's custody, such custody will not be granted. The Court in *Root* **specifically found that Father's home was not suitable, and that the new step-mother had her own problems**. In essence, the Court added the "harm" element not discussed in *Troxel* - that in order to deviate from the legal parent's determination of the child's best interest, the Court had to find that actual harm would result to the child if she was not placed in the non-parent's custody.

Where the non-parent has played a joint role in raising the child, Colorado Courts have recognized the existence of a psychological parentage that places the non-parent on equal footing with the parent. *In re the Marriage of Dureno,* 854 P.2d 1352 (Colo.App. 1993). In *Dureno,* Mother alleged and proved at the time of the parties' dissolution of marriage proceeding that Husband was not the child's biological father. The Court held visitation rights may be awarded to a non-parent under some limited circumstances. The Court also noted that the right to visitation is derived from a right to custody and is governed by the same legal principles. As Husband had legal standing to seek custody of the child based on his term of continuous residency with the child, he had the right to seek visitation with the child. The Court stated it may

grant visitation privileges to a step-parent or surrogate parent under the following conditions: (1) the non-parent is jurisdictionally capable of litigating custody under C.R.S. § 1410-123 (1); (2) the non-parent has acted in a custodial and parental capacity toward the minor child and visitation would be in the child' s best interest.

In order to determine whether, and to what extent, to grant non-parent visitation, the trial court should be guided by the statutory factors set forth in the best interest standard under C.R.S. § 14-10-124. In addition, however, the Court must under *Troxel* consider the wishes of the child's natural parent, the child's age, the nature and length of the relationship between the child and the non-parent, and the extent to which the child's well-being will be served by granting visitation to the non-parent.

The application of *Troxel* to *Dureno* would acknowledge that the child should have continued contact with the Husband, but that the Mother had a fundamental right to set the visitation schedule as she deemed appropriate. The Court must give Mother's schedule appropriate deference.

Custody of C.C.R.S., 892 P.2d 246 (Colo. 1995), dealt with a custody dispute between a parent who had never cared for the child and the non-parents who had cared for the child for 41/2 years in anticipation of adoption. Here, the Court held that the non-parents were entitled to seek custody and were not required to demonstrate parental unfitness as a prerequisite to an award of custody. The Court ruled that the appropriate standard was the best interest test so long as the parent's rights were not subject to full, final and irrevocable severance.

In disputes between parents and non-parents, Colorado Courts recognize the presumption that the natural parent has the first and prior right to custody. This presumption, however, may be rebutted by evidence establishing that a child's best interests are served by granting custody to the non-parent.

In his dissent, Justice Lohr anticipated the *Troxel* decision and asserted that parents have a fundamental Constitutional right to the care and custody of their children. A Court should not be able to deprive parents of the custody of their children and award custody to a non-parent without a finding that the parent is at least unfit in the absence of a compelling reason. Justice Scott held that the non-parents lacked standing to proceed as the mere "possession" of a child does not equate to "physical custody."

The C.C.R.S. decision again appears to apply the requirement that demonstratable harm would occur if custody and/or visitation were not granted to the non-parent. It is important to note that the amount of time the child remained in the non-parents care (and out of the parent's care) before a final decision played a significant factor in the court's determination that harm would occur.

In re the Custody of A.D.C., 969 P.2d 708 (Colo.App. 1998) is a case involving Grandparents who received custody even though their daughter maintained contact with the child. The Court held that a non-parent does not have to demonstrate by clear and convincing evidence that he or she has become the psychological parent. Once a non-parent establishes standing, the Court will consider that person's custody claim based on the best interest of the child standard. The trial court found that Mother, while not unfit, had been irresponsible in the care of the child, was immature, denied any responsibility

for her own situation, has led a nomadic lifestyle and had left the child in the custody of others, had abandoned the child for a period, and was not capable of providing a structured and stable environment. Again, the existence of harm played a major role in the Court's decision.

Where Colorado cases recognize the rights of psychological parents, they almost uniformly also find the existence of demonstratable harm if the relationship with the non-parent is not maintained. Reconciling these cases with *Troxel* requires the Court to defer to the parent's determination of contact with the non-parent, if contact is provided, and so long as harm is not established. As Dr. McLeod cannot establish that harm would occur if Dr. Clark's schedule was followed, the court should defer to Dr. Clark's schedule and recognize her fundamental rights as the child's sole legal parent.

D. COLORADO'S POST TROXEL DECISIONS

The application of *Troxel to* Colorado's statutes has not yet been addressed by our appellate courts. To date, *Troxel* has only been mentioned in two Colorado appellate cases, neither of which directly related to this matter, but both of which reassert the fundamental right of a parent to choose the: manner in which their child is raised.

Cooper v. United States Ski Association, 2000 WL 1159066 (Colo.App. 2000), *rehearing denied,* Oct. 12, 2000, was a personal injury suit initiated by Father on behalf of his son against the United States Ski Association. Of relevance to *Troxel,* Mother had signed a release on her child's behalf. The Court found that the release signed by Mother was enforceable and cited *Troxel* in support of the positions that a parent has a fundamental right under the Due Process Clause

to make decisions concerning the care, custody, and control of their children, and that parents have a fundamental liberty interest in the rearing of their children. In *Cooper,* because the parent had the right to make decisions on behalf of her minor child, a release signed by the parent controls over the child's right to initiate litigation contemplated by the release.

L.L. v. People, 10 P.3d 1271 (Colo. 2000), was a dependency and neglect action in which the minor child was placed in custody of the State. Though the Court eliminated all of the parent's parenting time with the child and a majority of her parental responsibility, the Court left certain rights under the parent's control. The appellate court recognized that parents possess a right to the companionship, care, custody, and management of their children, and a fundamental Constitutional right to maintain family relationships free from governmental interference. As such, the government must meet certain due process and equal protection standards before these Constitutional rights can be extinguished. Clear and convincing evidence is necessary to find in support of a total termination of parental rights. However, as the Court did not divest the parent of all of her rights (her parental rights were not terminated), the Court held that the trial court decision could be based on the lower preponderance of the evidence standard.

Though neither *L.L.* or *Cooper* shed much light on the application of *Troxel* to the case at issue, it is important to note that both reaffirm the parent's fundamental right under the Due Process Clause of the United States Constitution to make decisions regarding the care, custody and control of their children.

In the current case, Dr. Clark is the sole parent and thus it must be recognized that she has a fundamental right to make

decisions regarding the care, custody and control of her child. *Troxel,* 120 S.Ct. 2054.

E. NATIONAL TROXEL DECISIONS

Following the *Troxel* decision, many other states have invalidated or restricted their third party visitation statutes to provide for appropriate deference to the parent's determinations. In *Punsly v. Ho,* 87 Cal.App.4th 1099, 105 Cal.Rptr.2d 139 (Cal.App. 2001), paternal grandparents sought visitation with their grandchildren after the death of their son. Visitation began and later was restricted. The trial court ordered visitation over Mother's objection even though Mother offered to allow contact on a more limited basis than was requested. In *Punsly,* as in *Troxel,* there were no allegations that the parent was unfit. The appellate court noted that the State's recognition of an independent third-party interest in a child places a substantial burden on the traditional parent-child relationship. In discussing the breadth of the Washington statute, the Court noted that under such statute, a Washington court could, in effect, disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interest. The Court noted the three key *Troxel* facts which were: 1) Mother was fit and proper person to have custody; 2) the Court gave no special weight to parent's determination of child's bests interests; and 3) the Court failed to give weight to a voluntary offer of visitation. In analyzing *Punsly,* the Court agreed that the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child-rearing decisions simply because a state judge believes a "better" decision could be made.

As part of this decision, the Court analyzed a contrary decision out of Missouri, *In re G.P.C.*, 28 S.W.3d 357 (Mo.App. 2000). In *G.P.C.* the Missouri appellate court held that its third party visitation statute did not violate *Troxel* as its statute only applied to grandparent visitation and did not allow the Court complete and independent authority to overrule the parent's determinations. As the Missouri statute authorized the trial court to appoint a GAL, the appellate court ruled that the trial judges determination would be based on more than just its own view of the child's best interest.

The *Punsly* Court noted that the California statute has similar provisions restricting the class of people who could seek visitation, but noted that such a distinction was not the basis of the *Troxel* decision. The Court stated that *Troxel* was based on the fact that the statute authorized third party visitation solely on the Court's finding that such visitation is in the child' s best interest. It is when the Court exercises this discretion to substitute its own judgment of a child's best interests for that of a competent custodial parent that a parent's fundamental rights are threatened.

Colorado's statutes also allow the Court to appoint a G.A.L. - Special Advocate or Special Representative - or even a custody evaluator. However these professionals are only authorized to make a report to the Court. C.R.S. § 14-10-116 and C.R.S. § 14-10-127. The Court cannot delegate such decisions and ultimately we still have a jurist imposing their determination of the child's best interest over a fit parent's objections. The *Troxel* decision stands for the position that an order of non-parental visitation, issued over the objection of a competent parent, does not withstand a Constitutional due process challenge based on alleged infringement of a parent's fundamental rights, especially when the Court ignores a parent's voluntary efforts to arrange visitation and effectively

places a burden on a parent to disprove a presumption that non-parental visitation is in his or her child's best interests.

In *Guardianship of Olivia J.*, 84 Cal.App.4th 1146, 101 Cal.Rptr.2d 364 (Cal.App. 2000), California also found that a ***third party must establish harm*** from the denial of contact prior to receiving visitation or custody. In *Olivia J.*, a former domestic partner filed a petition for guardianship of the former partner's biological child. The trial court dismissed the former partner's petition based on her status as a non-parent holding that, in the absence of an allegation of abuse, neglect or abandonment, a non-parent could not, as a matter of law, establish that parental custody was detrimental to the child. The Court further held that a finding of detriment could not be based upon a showing that the natural parent is depriving the child of a relationship with another non-parent.[2]

In *Clark v. Wade*, 544 S.E.2d 99 (Ga. 2001), the Georgia Supreme Court reviewed two cases involving custody disputes between non-custodial fathers and custodial grandparents. In both cases the trial court granted custody to the non-custodial fathers, even after finding that the best interest of the child was served by custody with grandparents. The trial court struck down Georgia's "best interest" statute as unconstitutional.

The Georgia statute at issue provides that a third party may gain custody over a parent if that third party can overcome three presumptions: 1) a parent is a person entitled to custody; 2) a fit parent acts in the best interest of his or her

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[2] They noted that dismissal was improper without a hearing on the merits because the petition alleged that parental custody was harmful.

child; and 3) the child's best interest is to be in the custody of a parent. Such a test would appear to provide adequate protection for the parent's rights and their relationship with their children. However, the Georgia statute also provides that these rebuttable presumptions may be overcome by a showing that custody with a third party is in the child's best interest.

In reconciling *Troxel* with the Georgia statute, the Court construed its custody statute as requiring the third party to show, by clear and convincing evidence, that parental custody would harm the child in order to rebut the statutory presumption in favor of the parent. With this narrowing construction, the Georgia Court found its statute to be Constitutional.

As in Colorado, the Georgia statute limits the class of individuals who may petition for custody. Georgia's statute goes further than Colorado's by establishing a rebuttable presumption in favor of parental custody. The Georgia Court noted that this leaves the Court with a best interest test that can be used to overcome a fit parent's wishes. Though not discussed in the *Troxel* plurality, the Georgia Court appears to have agreed with Justice Thomas' concurring opinion requiring a demonstration that parental custody would **harm** the child in order to rebut the statutory presumption in favor of the parent. Once this presumption is overcome, the third party must show that an award of custody to him or her will best promote the child's health, welfare and happiness. The Georgia Court defined "harm" as either physical harm or significant, long-term emotional harm.

...party seeking visitation to show that it would be in the child's best interest and that the trial court must accept the presumption that a fit parent will act in a child's best interest.

Maryland applied *Troxel* in *Brice v. Brice,* 754 A.2d 1132 (Md.App. 2000). With facts very similar to *Troxel,* paternal grandparents sought visitation after their son's death. Mother objected to the amount of time requested. The Maryland Court held that even though its statute is narrower than Washingtons (it applied only to grandparents), the statute still violated *Troxel.* The *Brice* Court acknowledged that visitation over a parent's objection was an inappropriate violation of fundamental parental rights.

CONCLUSION

Colorado's third party custody and visitation statutes are more restrictive than the Washington statute, however, the final decision in Colorado still rests on the Court's determination of the child's best interest. C.R.S. § 14-10-124. As instructed by *Troxel,* where the parent is a fit individual, the Court must presume that the parent is acting in the child's best interest and must also defer to that parent's determination of the child's best interest. The Court must also require the non-parent to prove that the failure to provide her with the requested contact would not be in the child's best interest and not switch the burden of proof to the parent.

The cleanest way to reconcile *Troxel* with Colorado's statute is to require the non-parent to establish that the child would be harmed if the contact requested by the non-parent were not-granted. *(See Punsly supra* and Justice Thomas concurring opinion, *supra).* This would allow the Court to defer to the parent's determination unless the Court found that actual harm would occur. As Dr. McLeod cannot establish that harm would occur if the Court deferred to Dr. Clark's proposed schedule, the court should be prohibited from imposing its own version of the child's best interest.

WHEREFORE, Dr. Clark respectfully requests that this Court review and set aside the Magistrate's orders granting Dr. McLeod an equal schedule of parenting time over Dr. Clark's objection.

By: /s/ _____
Jordan M. Fox (No. 23971)

APPENDIX K

DISTRICT COURT,
DENVER, COLORADO
Denver City and County Building
1437 Bannock Street, Room 256
Denver Colorado 80202
Telephone: (303) 640-2491

Case Number 96 DR 39
Courtroom 21

[Filed August 23, 2001]

In re the Custody and Support of:	)
	)
E.L.M.C.,	)
minor child,	)
	)
and concerning	)
	)
CHERYL ANN CLARK and ELSEY MAXWELL McLEOD, Co-Petitioners.	)
	)

Attorney or Party Without Attorney (Name and Address):
Jordan M. Fox, Esq.
Attorneys for Co-Petitioner CHERYL A. CLARK
CAGE & NORTH, P.C.
1433 17th Street
Denver, Colorado 80202
Phone Number: (303) 295-0202

FAX Number: (303) 296-7403
E-mail: jfox@cagenorth.com
Atty. Reg. # 23971

REPLY TO CO-PETITIONER CLARK'S RESPONSE TO MOTION FOR REVIEW OF MAGISTRATE'S ORDER OF JULY 10th, 2001

Co-Petitioner, Cheryl A. Clark, M.D., hereby files her Reply to Dr. McLeod's Response to the Motion for Review of certain portions of the Magistrate's Order of July 10, 2001 ("Order") pursuant to Colorado Rules for Magistrates 7(a) ("C.R.M."). In support of this Reply, Dr. Clark states as follows:

1. The core of this case is the application of *Troxel v. Granville,* 530 U.S. 57, 120 S.Ct. 2054 (2000) to the facts of this case. As noted in Dr. Clark's trial brief on this issue, *Troxel* stands for the proposition that a fit legal parent has a fundamental constitutional right to make decisions for her child absent the court's interference. The Magistrate found that Dr. Clark is a fit parent. As she is the child's only legal parent, the Court must defer to her determination of what is in her child's best interest.

2. Dr. McLeod suggests that *Troxel* does not apply because it addresses grandparent visitation. As noted in both parties' trial briefs on this issue, the high courts of many of our sister states disagree with Dr. McLeod's assessment and have instead found that *Troxel* stands for the fundamental right of a fit parent in conflict with any non-parent.

3. Dr. McLeod also places much weight on the factual findings in the Magistrate's order. It is important to note

that the parties did not conduct an evidentiary hearing before Magistrate Dupree and thus the Magistrate's factual findings are based on her speculation, and not necessarily on the facts of the case.

4. At a evidentiary hearing, the Court would find that Dr. McLeod did not participate in the application process for the child's adoption, did not provide any financial support for the adoption, and has not contributed to the child's financial care since the adoption. The Court would also find that the parties were not co-parents and that the fact that they resided in the same home does not make Dr. McLeod a legal parent.

5. Under Dr. McLeod's theory of the case, the child can, in as little as six months, have two new parents if Dr. Clark and Dr. McLeod enter into new relationships. There is a legal definition of a parent and that definition does not include Dr. McLeod.

6. The Cases cited by Dr. McLeod in support of her claim to be a de-facto parent all address situations where the legal parent was not a fit parent or the situation where the child would be endangered by being *returned* to the care of the legal parent. In our case, the child has always been in the care of Dr. Clark, a fit legal parent, and thus *In re the Matter of the Custody of C.C.R.S.*, 892 P.2d 246 (Colo. 1995) does not apply. It should be noted that if *Troxel* had been decided at the beginning of the *C.C.R.S.* case, it is likely that the Court would have returned the child to the legal parent immediately, rather than waiting 4-1/2 years before issuing a final decision.

7. *Troxel* makes it clear that the biological (or adoptive) parent has rights superior to other claimants and thus prior

Colorado cases that might conflict with that ruling are now overruled.

8. *Troxel* does apply to the facts of this case, and the Court must therefore defer to Dr. Clark's determination of a visitation schedule that she believes is appropriate for her daughter.

WHEREFORE, Dr. Clark respectfully requests that this Court review those aspects of the Magistrate's Order of July 10th, 2001 concerning the proper legal standard to be utilized in a parenting dispute between a legal parent and a third party.

Dated August 23, 2001

By: /s/ _____
Jordan M. Fox (No. 23971)

APPENDIX L

DISTRICT COURT,
CITY & COUNTY OF DENVER, COLORADO
1437 Bannock Street, Room 256
Denver Colorado 80202

Case Number 96 DR 39
Courtroom 21

[Filed April 7, 2003]

In re the Custody and Support of:	)
	)
E.L.M.C. ,	)
minor child,	)
	)
And concerning	)
	)
CHERYL ANN CLARK and ELSEY MAXWELL McLEOD, Co-Petitioners.	)
	)

Attorney for Co-Petitioner Cheryl Ann Clark:

Name: James P. Rouse
Amy d. Desai
Rouse & Associates, P.C.
Address: 7400 E. Orchard Road, Suite 3000,
Greenwood Village, CO 80111
Phone Number: 303-694-0694
FAX Number: 303-694-0630

E-mail: jrouse@rouseandassoc.com
Atty. Reg.#: 10675 (Rouse), 30112 (Desai)

**DR. CLARK'S TRIAL BRIEF-
PERMANENT ORDERS HEARING**

COMES NOW Dr. Cheryl Ann Clark ("Dr. Clark"), by and through her attorneys of record, Rouse & Associates, P.C., and submits this trial brief for the court's use and information at the permanent orders hearing scheduled for April 14 & 15, 2003.

STATEMENT OF THE FACTS

This case began in 1996 when two lesbian partners filed a petition for joint custody with this court. This court subsequently approved said petition and entered a joint custody order. The co-petitioners, Cheryl Ann Clark (hereinafter referred to as "Dr. Clark") and Elsey Maxwell McLeod (hereinafter referred to as "Dr. McLeod") proceeded to raise the minor child, E.L.M.C., in their house. The amount of Dr. McLeod's involvement in raising E.L.M.C. is a matter of dispute between the parties.

Dr. Clark had adopted a girl, E.L.M.C., born in China. The foreign adoption was domesticated in Colorado on July 11, 1995. Dr. Clark was the only adoptive parent.

Subsequently, Dr. Clark and Dr. McLeod ended their relationship and a dispute resulted over the parenting time that Dr. McLeod demanded to spend with E.L.M.C. Dr. McLeod filed a Verified Motion for Establishment of a Parenting Time Schedule pursuant to C.R.S. Section 14-10-124. Dr. McLeod did not request an award of any parental responsibilities. Dr. Clark filed a Verified Response. Dr. Clark proposed a

parenting time schedule that gave Dr. McLeod significant time with E.L.M.C. That schedule was every other weekend from Thursday through Monday morning and Wednesday evening with the child on the off week. Dr. Clark also proposed that the schedule be modified during the summer months in order to allow Dr. McLeod to spend more time with E.L.M.C. Dr. Clark also filed a Verified Forthwith Motion for Temporary Orders to establish a parenting time schedule. At no time has Dr. Clark ever proposed that all contact between her daughter, E.L.M.C., and Dr. McLeod be terminated. At no time has Dr. Clark denied visitation altogether between Dr. McLeod and E.L.M.C.

On April 3, 2001, a "hearing" was held before Magistrate Dupree. No evidence was taken at the hearing, attorneys then representing the parties simply met with the Magistrate in chambers. The Magistrate then verbally set out guidelines for the temporary orders. The Magistrate ruled that as long as Dr. McLeod was living in the same house as Dr. Clark, one adult would vacate the house every three days so that the other one could have parenting time with E.L.M.C. at the residence where the child resided. The Magistrate further ordered the parties to brief two issues in preparation for a Permanent Orders Hearing. The first issue was the legal standard for determination of parenting time, including who has the burden, and whether it is a "low or a high burden." The second issue was the validity of the 1996 Order granting joint custody to Dr. Clark and Dr. McLeod. The parties did in fact brief those issues.

On June 5, 2001, Magistrate Dupree entered signed written temporary orders, but modified her prior verbal order to provide that, "Dr. Clark shall exercise parenting time in the parties' former joint home and Dr. McLeod shall exercise her parenting time w/E.L.M.C. in her new residence."

On July 10, 2001, Magistrate Dupree entered a written order regarding the validity of the 1996 joint custody decree and the standard to be applied in determining parenting time in a case where there are an adoptive parent and a psychological parent vying for parenting time. Magistrate Dupree vacated the 1996 joint custody decree on grounds that the court had no jurisdiction to enter such decree because there was no dispute before the court. Magistrate Dupree further ruled that the United States Supreme court case of *Troxel v. Granville,* 530 U.S. 57 (2000) (hereinafter referred to as *"Troxel")* did not control the determination of what parenting time schedule was appropriate for a minor child. The court instead applied the "best interest standard." The magistrate *sua sponte* gave Dr. McLeod joint parental responsibility in spite of the fact that Dr. McLeod had never requested any parental responsibilities at all.

Dr. Clark appealed the portion of the Magistrate's July 10, 2001 order dealing with *Troxel* issues to the District Court. The Honorable R. Michael Mullins, in a two-sentence order, affirmed the order of the Magistrate.

At a hearing on Dr. Clark's motion to modify the Temporary Orders, held on July 30 and August 26, 2002, this court modified the Temporary Orders to provide that parenting time would rotate on a weekly basis. Further, the court granted Dr. Clark sole parental responsibility as to decisions regarding the religious upbringing of the child. Dr. Clark has submitted a proposed parenting plan, a copy of which is attached to the Trial Management Certificate filed on April 4, 2003. It proposes that the Dr. Clark, as the sole legal parent, be awarded sole parental responsibility for the child. Dr. Clark's plan still provides for Dr. McLeod to have significant time with E.L.M.C., although not on the exact equal division of time Dr. McLeod insists upon having. No

one disputes that Dr. Clark is a fit and proper parent for her child. No one disputes that Dr. Clark is the only legal parent of E.L.M.C.

ARGUMENT

I. A long line of Supreme Court cases supports Dr. Clark's right to determine the parenting time schedule of her child.

The United States Supreme Court has long recognized the rights of a parent to direct the upbringing of her child. There are certain liberties guaranteed by the 14th Amendment to the United States Constitution. "Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by freemen." *Meyer v. State of Nebraska,* 262 U.S. 390, 399 (1923). A parent's 14th Amendment rights include "the liberty of parents...to direct the upbringing and education of children under their control." *Pierce v. Society of Sisters,* 268 U.S. 510, 534-35 (1925). "The child is not the mere creature of the state...." *Id.*, at 535. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Commonwealth of Massachusetts,* 321 U.S. 158, 166 (1944).

In subsequent cases, the United States Supreme Court also recognized the fundamental right of parents to make decisions

concerning the care, custody, and control of their children. "It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" *Stanley v. Illinois,* 405 U.S. 645,651 (1972)(dealing with rights of an unwed father). The State's interest in caring for the child of a natural or adoptive parent is de minimis if that parent is shown to be a fit parent. *Id.*, at 657-58. The United States Supreme Court has recognized that:

> The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); *See also, Quilloin v. Walcott,* 434 U.S. 246, 255 (1978)("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.").

The importance placed upon the relationship between the child and a legitimate parent has been emphasized by the higher standard of proof required before the State can substantially interfere with the parent's constitutional rights. *See, Santosky II v. Kramer,* 455 U.S. 745, 766-67 (1982) (a "clear and convincing evidence" standard of proof is the minimal standard of proof required to satisfy due process in a termination of parental rights hearing). The due process clause of the 14th Amendment provides heightened protection against government interference with certain fundamental rights and liberty interests, including the right to have

children and to direct the education and upbringing of one's children. *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997).

The prior relationship between Dr. Clark and Dr. McLeod is the type of shifting economic arrangement that is not entitled to the constitutional protection that the Supreme Court of the United States has consistently granted to the relationship between a legal parent (whether adoptive or biological) and child. *See, People in the Interest of A.W.R.*, 17 P.3d 192, 197 (Colo. App. 2000), *certiorari denied.* (Foster mother's relationship with child did not give rise to a constitutionally protected liberty interest.).

II. *Troxel* requires that the court defer to the parenting time schedule proposed by Dr. Clark.

***A.* *Troxel* controls the rights of the adults in this case.**

The United States Supreme Court again addressed the fundamental right of a legal parent to direct the upbringing of the parent's child in *Troxel.* The case arose in the context of a "breath takingly broad" State of Washington non-parental visitation statute. This particular case involved visitation by grandparents enforced by the court against the will of the mother.

The United States Supreme Court stated that, "so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel, supra,* at 68-69. As in *Troxel,* no one in this case has alleged that Dr. Clark is an

unfit parent. Dr. Clark is the only legal parent of the child. She is the child's adoptive parent. As a result, pursuant to C.R.S. § 19-5-211 (1), Dr. Clark has all of the rights and responsibilities of a natural parent. Dr. McLeod does not have this status.[1] Dr. McLeod did not adopt E.L.M.C., although she could have adopted a child of her own had she wished to he a mother to a child.

In *Troxel,* the fit, legal parent did not seek to cut off visitation by the grandparents entirely. *Troxel, supra,* at 71. That is the same situation in this case. Dr. Clark has not sought to deprive Dr. McLeod of parenting time altogether. In fact, Dr. Clark proposes a "traditional parenting time plan."[2] "[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Troxel, supra,* at 72-73. In *Troxel* the case involved nothing more than a simple disagreement between the Washington trial court and Granville regarding her children's best interests. *Id.,* at 72.

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[1] Even though the court has found that Dr. McLeod was a "psychological parent," such status does not give her the constitutional or legal rights of a biological or adoptive parent, as explained *infra.* Dr. McLeod is in a constitutional and legal sense still just a third party for purposes of determining parenting time and/or parental rights.

[2] Dr. Clark's parenting plan proposes that Dr. McLeod spend decreasing time with E.L.M.C.. Dr. Clark's parenting plan is based, in part, on the case of *In re Parental Responsibilities Concerning K.L.M.D.*, Colorado Court of Appeals Case No. 99DR1644. A copy of the appellate court's unpublished opinion is attached hereto for the court's information.

As such, the trial court should have deferred to the decision of the fit, legal parent.

B. This court must make its decision based on strict scrutiny.

A fit parent who is not seeking to cut off all parenting time is presumed to act in the best interests of her child. *Troxel, supra,* at 68. The court must accord at least some special weight to the fit legal parent's own determination. *Troxel, supra,* at 70. As noted above, Dr. Clark has a fundamental constitutional right to direct the education and upbringing of her child. Although the majority opinion in *Troxel* did not address the standard of proof required to overcome the presumption that a fit parent acts in the best interest of her child, at least one Justice recognized that strict scrutiny is applied to infringements of fundamental rights. *Troxel, supra,* at 80 (J. Thomas concurring).

Courts have required more that a rational basis to support a state action that infringes on the exercise of a fundamental right. *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 440 (1985) (state laws that impinge on personal rights protected by the constitution are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest); *San Antonio Independent School District v. Rodriguez,* 411 U.S. 959, 1289 (1973) (strict scrutiny test applies to cases involving laws interfering with exercise of fundamental rights protected by the constitution). Strict scrutiny review, the most exacting standard of review, is reserved for government actions that infringe on <u>any</u> fundamental right. *Evans v. Romer,* 854 P.2d 1270, 1275 (Colo. 1993) (emphasis added). Government action that infringes on a fundamental right is constitutionally permissible only if it is necessary to promote a compelling state interest,

and does so in the least restrictive manner possible. *Evans v. Romer,* 882 P.2d 1335, 1341 (Colo. 1994), *aff'd,* 517 U.S. 620 (1996) (emphasis in original). "The Supreme Court has addressed the issue of parental autonomy in a number of cases over the years and has always used strict scrutiny when deciding those cases." *In re Custody of C.M.*, __ P.3d __ , 2002 WL 31116773, *2 (Colo. App. 2002).

The Supreme Court of Arkansas has ruled that strict scrutiny applies to the state's intrusion upon a single parent's Fourteenth Amendment right to make decisions regarding parenting time and the raising of her child. *Linder v. Linder,* 348 Ark. 322, 348-49, 72 S.W.3d 841, 855 (2002) (strict scrutiny should apply in a case involving a claim that the Arkansas Grandparental Visitation Act was unconstitutional as applied). The Supreme Court of Connecticut has adopted the strict scrutiny standard consistent with the United States Supreme Court's determination in *Troxel* "that a parent's interest in the care, custody and control over his or her children is 'perhaps one of the oldest of the fundamental liberty interests recognized by [the] Court.'" *Roth v. Weston, 259* Conn. 202, 218, 789 A.2d 431,441 (2002). The Supreme Court of Iowa agrees. *Santi v. Santi,* 633 N.W.2d 312, 318 (Iowa 2001)("We are convinced that the nature of the liberty interest impacted here- the decision by fit, married parents to oppose visitation by third parties outside the nuclear family - is one that... has historically been protected by the highest level of scrutiny."). Thus the state (i.e., a court issuing a ruling on visitation) must show a compelling interest in interfering with a fit legal parent's decision regarding visitation with third parties and must narrowly tailor any such interference. *Id.*

Therefore this court should not enter any order on parenting time or parental responsibilities contrary the plan proposed by Dr. Clark unless this court has a compelling reason to do so, and even then this court must use the least restrictive means available to the court. Mere disagreement with Dr. Clark's decision is not a compelling reason for this court not to adopt her parenting plan. *Linder v. Linder, supra,* 348 Ark. at 352, 72 S.W.3d at 858.

C. The trial court should apply a clear and convincing standard at a minimum.

Where fundamental liberty interests, such as the right to raise one's children, are infringed, courts in other states have recognized that a clear and convincing evidence standard of proof is required to pass constitutional muster. *Roth v. Weston, supra,* 259 Conn. at 235, 789 A.2d at 450; *Harris v. Smith,* 752 N.E.2d 1283, 1290 (Ind.Ct.App. 2001)(in third party visitation case "clear and persuasive" showing of harm to child required by *Troxel); Greer v. Alexander,* 248 Mich.App. 259, 639 N.W.2d 39, 43 (2001)(third party with custody of child must prove by clear and convincing evidence that best interests of child are served by leaving child in custody of third party when natural parent petitions for change of custody, citing *Troxel).*

The Georgia Supreme Court has held that in cases involving attempts by a biological parent to gain custody from a third party who has been responsible for the daily care of the child and who has already established a family unit for the child, the third party may overcome the presumption in favor of the biological parent having custody "only by presenting clear and convincing evidence that the award of custody to the parent is not in the best interests of the child." *Clark v. Wade,* 273 Ga. 587, 599, 544 S.E.2d 99, 108 (2001). This means

that the third party must show by clear and convincing evidence that either physical harm or significant, long-term emotional harm will result. *Id.*, 273 Ga. at 598, 544 S.E.2d at 107. Dr. McLeod has not made such allegations in her petition, let alone proven them.

Previously, the Magistrate relied heavily on the case of *Rubano v. DiCenzo,* 759 A.2d 959 (R.I. 2000) in reaching the conclusion that the best interests test, rather than *Troxel,* controlled this case. Given that the Rhode Island Supreme Court failed to recognize that strict scrutiny was required and that clear and convincing evidence of real and serious harm was required before the court could override the wishes of the fit legal parent regarding visitation, *Rubano v. DiCenzo* is improperly decided. The Rhode Island Supreme Court subsequently acknowledged that *Rubano v. DiCenzo* was decided under the Uniform Law on Paternity. *Keenan v. Somberg,* 792 A.2d 47, 49 (R.I. 2002). The Rhode Island Supreme Court has now recognized that "an important presumption exists that fit parents act in the best interests of their children." *Id.,* at 50 (relying on *Troxel* in a case involving a dispute between the biological father and the deceased mother's boyfriend who had an ongoing personal relationship with the children).

Where there is a fit, legal parent caring for the child, the party seeking to overcome the determination made by the fit legal parent must bear the burden of proof. *Troxel, supra,* at 69. The burden is on Dr. McLeod to show by clear and convincing evidence that Dr. Clark's proposed parenting time schedule would be injurious to the child.

D. Post *Troxel* decisions support Dr. Clark's right to determine parenting time that her child has with a non-parent.

The Colorado Court of Appeals has now addressed *Troxel* issues in the context of parenting cases.

"One of the relevant factors in determining a child's best interests is the 'wishes of the child's parents as to parenting time.' Section 14-10-124(1.5)(a)(1), C.R.S." *In re Custody of C.M., supra,* at *3. The best interests standard, which is the guiding principal in awarding custody even in disputes involving non-parents, is subject to the presumption that the legal parent has a first and prior right to custody. *Id.* This presumption does not extend to non-parents, even though the non-parent may have been involved in the child's life on a daily basis. *In the Matter of the Petition of M.G.,* 58 P.3d 1145, 1147 (Colo. App. 2002) (fundamental liberty interesting rearing children does not belong to a guardian).

Where there is a dispute over parenting between psychological parents and the legal parent, the court cannot ignore the presumption accorded to the legal parent. *People ex rel A.M.K.,* ___ P.3d ___ , 2003 WL 548830, *2 (Colo. App. 2003).

Courts in other states have also dealt with this issue in light of the United States Supreme Court's decisions in *Troxel.*

There is a "constitutionally based preference that a parent, rather than a non-parent, have custody of his or her child where that parent has not been shown to be unfit." *Harris v. Smith, supra,* at 1289 (relying on *Troxel*). In the absence of allegations that the legal parent is unfit, the court is required

pursuant to *Troxel* to presume that the visitation schedule proposed by the legal parent is in the best interests of the child. *Crockett v. Pastore,* 259 Conn. 240, 249, 789 A.2d 453,458 (2002). Further, to pass constitutional muster, even if the third party is in a "parent-like relationship" with the child, the third party seeking visitation must show that the child would suffer real and significant harm from the visitation schedule proposed by the legal parent. *Id.,* 259 Conn. at 249, 789 A.2d. at 459.

The *Troxel* decision requires a court to "presume that a fit parent's decision is in the best interest of the child." *Crafton v. Gibson,* 752 N.E.2d 78, 96 (Ind.Ct.App. 2001); *see also, State Department of Social and Rehabilitation Services v. Paillet,* 270 Kan. 646, 659, 16 P.3d 962, 970-71 (2001). "Thus, the best interests determination cannot be left solely to the trial court's discretion without considering and giving deference to a fit parent's decision." *Crafton v. Gibson, supra.* Where there is no allegation that the legal parent, Dr. Clark, is not a fit parent, "the trial court was required under *Troxel* to give special weight to her decision." *Id.* "Additionally, the *Troxel* court indicated that a trial court should give some weight to a fact that a parent has agreed to some visitation." *Id.*

Absent a finding of unfitness or neglect by the legal parent, a pure best interests test (i.e., one that denies the fit legal parent the presumption that she is acting in the best interests of her child) would violate the legal parent's constitutional rights. *Brewer v. Brewer,* 139 N.C.App. 222, 231, 533 S.E.2d 541, 548 (2000)(citing *Troxel). In Brewer v. Brewer,* the court held that it would violate a legal parent's due process right to deny her the presumption that she acts in the best interests of her child where she has not voluntarily or involuntarily relinquished custody to a third party, had never

been adjudged unfit, and had never acted in a manner inconsistent with her protected parental status. *Id.*, 139 N.C.App. at 232, 533 S.E.2d at 548. Dr. Clark never relinquished custody of her child to Dr. McLeod. She simply allowed Dr. McLeod to participate in her life and the life of her daughter. Dr. Clark has never been adjudged unfit, nor has she ever acted in a manner inconsistent with her protected parental status.

III. Dr. McLeod's Court-bestowed status of "psychological parent" does not overcome Dr. Clark's 14th Amendment rights.

Dr. McLeod's claim for parenting time, and/or parental rights, arises solely from her prior lesbian relationship with Dr. Clark. Dr. McLeod could have adopted a child of her own, but obviously chose not to do so. Dr. McLeod has no legal responsibilities for the adopted child of another person, but she seeks the legal benefits by court fiat. Dr. McLeod's court-bestowed status of "psychological parent" is insufficient to overcome the fundamental constitutional rights of the fit, legal parent, Dr. Clark. Dr. McLeod is still merely a third party, not a legal parent. *See People ex rel A.M.K., supra.*

State law, like nature itself, makes no provision for E.L.M.C. to have two mothers. *See Michael H. v. Gerald D.*, 491 U.S. 110, 118 (1989) ("California law, like nature itself, makes no provision for dual fatherhood."). There is no legal parental relationship between Dr. McLeod and E.L.M.C., and there is no legal relationship between Dr. McLeod and Dr. Clark as there is between a married man and woman in Colorado. Obviously Dr. McLeod is not E.L.M.C.'s natural parent. Dr. McLeod could not adopt E.L.M.C. under Colorado law, and she never even attempted to do so. *See,* C.R.S. § 19-5-202. It is the traditional family that western

law and culture had bestowed protection upon. *See Wisconsin v. Yoder, supra,* at 232 ("The history and culture of western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children."). Only when the traditional mother and father have not conducted themselves properly or have for some reason become unfit parents, such as through abuse of the children, neglect of the children, abandonment of the children, or conviction of crimes, has the court seen fit to allow non-parents in a parent-like relationship with the child to supersede the fundamental rights of the natural, or legal parent. *See Quilloin v. Walcott, supra,* at 255 (father who had not at any time had, or sought actual or legal custody of his child did not have his constitutional rights infringed when court allowed adoption by people who been acting as child's parents). Indeed, the United States Supreme Court has noted that the absence of a legal tie with the legal parent places a limit on whatever substantive constitutional claims might exist by virtue of the other party's actual relationship with the children. *Lehr v. Robertson,* 463 U.S. 248, 260, n. 16 (1983). Any other decision puts E.L.M.C. at risk of having numerous "psychological parents" control her life, without the knowledge or consent of the legal, adoptive parent. *E.g., In re the Marriage of Martin,* 43 P.3d 75, 77 (Colo. App. 2002)("In many stepfamilies, the stepparent assumes the role of the psychological parent."), *see also, Titchenal v. Dexter,* 166 Vt. 373, 382, 693 A.2d 682, 687 (1997)("Indeed, many courts and commentators have noted the potential dangers of forcing parents to defend third-party visitation claims.").

Dr. McLeod may well have other "partners" who are sufficiently involved in E.L.M.C.'s life to gain "psychological parent" status. Yet Dr. Clark would have no control over with whom Dr. McLeod forms relationships or how Dr. McLeod would allow such third parties to be

involved in E.L.M.C.'s life. Dr. Clark, the fit legal parent of E.L.M.C., would then be deprived of her 14th Amendment rights, through no fault of her own. Dr. Clark could easily be forced to defend her child against the claims of a limitless number of Dr. McLeod's future partners.

Dr. McLeod' s "psychological-parent" status is simply not equivalent to Dr. Clark's legal-parent status in light of controlling Colorado precedent. It is a child's legal parent who enjoys the rights and responsibilities of legal parenthood. *N.A.H. v. S.L.S.*, 9 P.3d 354, 359 (Colo. 2000). "The determination of parenthood includes the right to parenting time; the right to direct the child's activities; the right to make decisions regarding the control, education, and health of the child; and the right to the child's services and earnings." *Id.* Legal parenthood "imposes significant obligations as well, including the obligation of support and the obligation to teach moral standards, religious beliefs and good citizenship." *Id.* The Colorado Supreme Court has held that "although a child can certainly have emotional attachments to more than one father figure, she can have only one legal father." *Id.*, at 360 (citing *Michael H. v. Gerald D., supra).* By inference, a child can also have only one legal mother. In E.L.M.C.'s case, that legal mother is Dr. Clark, not Dr. McLeod. Under the rationale of *N.A.H. v. S.L.S*, only Dr. Clark has the right to make decisions regarding E.L.M.C.. This court should defer to Dr. Clark's parenting plan.

A. Psychological parent status should not be applied in this case.

The magistrate's prior order relied heavily on the case of *In the Matter of the Custody of C.C.R.S.*, 892 P.2d 246 (Colo. 1995)("C.C.R.S"). The Colorado Supreme Court in *C.C.R.S.* held that non-parents, in that case a couple with

whom the biological mother had agreed to place her child at birth, could in certain circumstances attain the status of "psychological parents" by having exclusive possession of a child for more that six months and therefore have the right to petition the court for custody of the child pursuant to C.R.S. section 14-10-123. The Court held that a "non-parent" could "include friends, relatives, grandparents, step-parents, or child-care agencies, or, in other words any person or agency other than the child's natural parents." *Id.*, at 256, n. 23. This interpretation of C.R.S. Section 14-10-123 makes the Colorado statute just as "breathtakingly broad" as the Washington statute struck down by the United States Supreme Court in *Troxel.* Dicta in *C.C.R.S.* indicates that psychological parent status can be bestowed even when the legal parent has done nothing to deprive herself of her rights to her children. *Id.*, at 257. In practice, however, since the decision in *C.C.R.S.*, the Colorado appellate courts have used "psychological parent" status to provide rights to a non-legal parent only when the legal parent was for some reason unfit or had not been involved in the child's life for an extended period of time.

People in the Interest of E. C. and A. C., 2002 WL 58900, (Colo. App. 2002) involved a custody dispute between foster parents and grandparents after a termination of parental rights in a dependency and neglect case. *In re the Custody of A.D.C.*, 969 P.2d 708 (Colo. App. 1998) involved a mother who voluntarily placed her child with the grandparents and then resided elsewhere. *In re Marriage of Dureno,* 854 P.2d 1352 (Colo. App. 1993), *certiorari denied,* involved the claims of a stepfather in a divorce case where the biological father had never had anything to do with the child. In the case of *Root v. Allen*, 151 Colo. 311,377 P.2d 117 (1962), the stepfather was given custody over the biological father where

the biological father had no contact with the child for more than six years.

This court has recognized that the concept of psychological parent status does not achieve legal significance unless the legal parent has not had physical custody and control of the child. *In re the Matter of V.R.P.F.*, 939 P.2d 512, 514 (Colo. App. 1997)("when a child has been in the physical custody of a non-parent for six months with no contact from the child's parents, the child may have formed an important attachment with the non-parent"). Likewise, when the legal parent has had only isolated contact with the child while the child is in the physical custody of a non-parent, such isolated contact does not defeat the non-parent's psychological parent status and legal standing. *Id.* However, it is undisputed that Dr. Clark, E.L.M.C.'s sole fit legal parent, has never been without the physical custody and control of her adopted child. Dr. Clark never gave up or was deprived of the custody of her child. Therefore, whether or not it was proper or not for the magistrate to have determined that Dr. McLeod was in fact a psychological parent, Dr. McLeod's status as a psychological parent does not deprive Dr. Clark of her constitutionally protected right to determine the parenting time schedule for her child.

To the extent that *C.C.R.S., In re the Custody of A.D. C., supra,* and *In re Marriage of Dureno, supra,* stand for the proposition that the fitness of a parent has no bearing on the determination of what is in the best interests of a child and/or that the fit legal parent is not presumed to act in the best interests of her child and/or that the court need not defer to the wishes of a fit legal parent, they are no longer good law because of the United States Supreme Court decision in *Troxel.* Further, the Colorado Court of appeals, in interpreting *C.C.R.S.,* has explicitly ruled that even in the

context of cases involving "psychological parents," the fundamental liberty interest of the fit legal parent gives rise to a presumption that the best interests of the child will be furthered by the decisions of the fit legal parent. *People ex rel A.M.K., supra,* at *2.

Dr. McLeod, as the alleged "psychological parent," has the burden of proof of overcoming Dr. Clark's presumption. A court decision refusing to defer to Dr. Clark's parenting plan will result in C.R.S. §§ 14-10-123 & 124 being unconstitutional as applied.

B. Psychological parent cases in other states show Dr. Clark should not be deprived of her 14th Amendment rights.

Dr. McLeod, as a court designated "psychological parent," does not constitutionally or legally stand on the same footing as Dr. Clark, the fit, legal parent. As a result, pursuant to *Troxel,* the trial court should deferred to the parenting time determination of the fit legal parent, Dr. Clark, and not impose the court's own version of what the court believes is in the best interest of E.L.M.C.. *See Linder v. Linder, supra,* 348 Ark. at 352-53, 72 S.W.3d at 858. This is especially true given the fact that Dr. Clark has never proposed termination of all contact between Dr. McLeod and E.L.M.C.. Under these circumstances, the courts should not even be involved in the lives of Dr. Clark and E.L.M.C.. *Troxel, supra,* at 68-70.

Courts in other states have refused to grant visitation or parenting time to the lesbian ex-partner of a child's biological or adoptive mother, even when the ex-partner claimed or was found to have the status of a psychological parent or de facto parent.

In re Thompson, 11 S.W.3d 913 (Tenn.App. 1999) involved two cases consolidated on appeal. In both cases, the former lesbian partner had contributed to the raising and financial support of the child. The children were named after both parties to the relationship. The lesbian non-parents claimed to be *de facto* parents and also alleged rights to visitation under the doctrine of *in loco parentis*. The court rejected the claimed right to visitation by non-parent former lesbian partners based upon the status of *de facto* parent and *in loco parentis*. *Id.*, at 923. ("we are unaware of and have not been cited to any prior controlling precedent that has utilized the concept of either *de facto* parenthood and/or *in loco parentis* to extend constitutional parental rights, including the right to visitation, to unmarried/unrelated persons...."). The Court of Appeals for the State of Ohio reached a similar result in the unreported case of *Liston v. Pyles,* 1997 WL 467327 *8 (1997) when it ruled that no United States Supreme Court case nor any case from the Ohio Supreme Court had recognized constitutional protection for "family relationships stemming from a homosexual union." The Ohio Court of Appeals ruled, "any 'parental' transactions which arise as a result of their relationship cannot be legally enforced by the domestic/juvenile court." *Id.*

Several California decisions have held that the former lesbian partner of the legal mother of a child has no right to visitation with the child. *Guardianship of Z.C.W. and K.G.W.,* 71 Cal.App.4th 524, 527-28, 84 Cal.Rptr.2d 48, 50 (1999)(former lesbian partner claiming de facto parent status cannot prevail on her argument that she is entitled to visitation rights nor can she use a guardianship proceeding to obtain visitation); *West v. Superior Court,* 59 Cal.App.4th 302, 306, 69 Cal.Rptr.2d 160, 162 (1997); *Nancy S. v. Michele G.,* 228 Cal.App.3d 831, 836-39, 279 Cal.Rptr. 212, 215-18 (1991)(former lesbian partner claiming to be "psychological

parent," claiming to be de facto parent, and claiming in loco parentis status had no standing to seek visitation with child of former partner); *Curiale v. Reagan,* 222 Cal.App.3d 1597, 1600-01, 272 Cal.Rptr. 520, 522 (1990)("Given the complex practical, social and constitutional ramifications of the [de facto parent] doctrine, we believe the Legislature is better equipped to consider expansion of California law should it choose to do so.").

The Supreme Court of Vermont, in the case of *Titchenal v. Dexter, supra,* dealt with a situation that was factually almost identical to the case before this court. The plaintiff, Chris Titchenal, and the defendant, Diane Dexter, began an intimate relationship with each other. They purchased a home together, held joint bank accounts, and jointly owned their automobiles. They both contributed financially to their household, and each regarded the other as a life partner. They decided to have a child and the defendant adopted a newborn baby. The parties held themselves out to the child and others as her parents. The child called one "Mama Chris" and the other "Mama Di." For the first three and one-half years of the child's life, the plaintiff cared for the child approximately 65% of the time. Plaintiff did not seek to adopt the child because the parties believed the then-current adoption statute would not allow both of them to do so. Eventually the parties' relationship faltered and the defendant moved out of the jointly owned residence. Eventually, the defendant severely curtailed the plaintiff's contact with the child. Plaintiff filed a complaint to obtain regular, unsupervised parent-child contact between her and the child. The Vermont Supreme Court ruled that the plaintiff's claim of being an equitable or de facto parent did not entitle her to have visitation with the child over the adoptive mother's objections. *Id.,* 166 Vt. at 377-78, 693 A.2d at 685.

The Maryland Court of Special Appeals has held that a de facto parent with a significant relationship with the child was still just a third party for purposes of determining visitation. *S.F. v. M.D.*, 132 Md.App. 99, 114, 751 A.2d 9, 16-17 (2000) (holding that former lesbian partner of child'S biological mother was not entitled to visitation under the circumstances of that case). A psychological parent is not entitled the same rights as a biological or adoptive parent. *Kazmierazak v. Query,* 736 So.2d 106, 110 (Fla. 4th DCA 1999) ("although this court has in the past recognized the concept of a psychological parent... we cannot construe these cases as holding a psychological parent is entitled to parental status equivalent to the biological parent"). Therefore, a psychological parent is not entitled to visitation over the objection of the child's biological mother. *Id; see also, Music v. Rachford,* 654 So.2d 1234 (Fla. 1st DCA 1995); *Alison D. v. Virginia M.,* 155 A.D.2d 11, 15, 552 N.Y.S.2d 321, 324 (1990).

Likewise, a "psychological" parent does not have the obligations toward the child that a biological or adoptive parent has. *See, State of Washington on behalf of D.R.M.,* 34 P.3d 887, 893-94 (Wash.App. 2001)(a former lesbian partner of child's biological mother is not a "parent" and owes no duty of child support).

To the extent Dr. McLeod relies on C.R.S. § 19-4-105(1)(d) to establish that she is a parent of E.L.M.C. on a legal and constitutional par with the sole adoptive parent, Dr. Clark, Dr. McLeod' s position requires a strained reading of the statute. Section 19-4-105(1)(d) provides that:

> (1) A man is presumed to be the <u>natural father</u> of a child if:...

> (d) While the child is under the age of majority, his receives the child into his home and openly holds out the child as his natural child. (emphasis added).

This portion of the Uniform Parentage Act ("UPA") clearly applies to a male, to wit, the father. *N.A.H. v. S.L.S., supra* at 360. Dr. McLeod is a female and has never claimed to be E.L.M.C.'s father. A lesbian partner of a child's legal mother is simply not a parent under the UPA. *N.A.H. v. S.L.S., supra,* at 360 ("... although a child certainly can have emotional attachments to more than one father figure, she can have only one legal father."); *State of Washington on behalf of D.R.M., supra,* 34 P.3d at 892; *Nancy S. v. Michele G., supra,* 228 Cal.App.3d at 836, 279 Cal.Rptr. at 215 (lesbian partner who was not natural or adoptive parent was not a parent within meaning of UPA); *see also, In re Adoption of R.B.F.,* 803 A.2d 1195, 1199-1200 (Penn. 2002) (a same-sex partner cannot be the "spouse" of the legal parent).

IV. E.L.M.C.'s constitutional rights do not require the court to ignore the presumption that the parenting time proposed by the fit legal parent, Dr. Clark is in the child's best interests.

This court cannot base its decision to ignore Dr. Clark's constitutional right to a presumption that her parenting time plan was in the best interests of her daughter on E.L.M.C.'s own perceived constitutional rights to have a psychological parent in her life. *Lehr v. Robertson, supra,* involved a situation where the biological father never had any significant custodial, personal, or financial relationship with the child, and he did not seek to establish a legal tie until the child was two years old. *Lehr v. Robertson,* 463 U.S. at 262. The mother and stepfather had filed a petition for the stepfather to adopt the child, and that petition had been granted. *Id.,* at

249-54. It was in this context that the United States Supreme Court ruled that the biological father was not entitled to have the adoption set aside and that the child could remain with the only father she had ever known. *Id.*, at 265. Clearly this case is distinguishable from the case before this court. Dr. Clark has always had a significant parental relationship with E.L.M.C.. Further, the case says nothing about the child's rights. It talks only about the biological father's rights not being violated because of his lack of a relationship with the child. *Lehr v. Robertson* provides no basis for depriving Dr. Clark of her 14th Amendment rights.

Michael H. v. Gerald D., supra, involved the challenge of an unwed biological father and his child to a California statute that provided that "the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." *Id.*, 491U.S. at 115. The child's biological mother was married to another man at the time of conception. *Id.* The United States Supreme Court upheld the statute in order to protect the marital family and provide the child with legitimacy. *Id.*, at 124. The facts of *Michael H. v. Gerald D.* are not remotely similar to the situation that E.L.M.C. finds herself in today. *Michael H. v. Gerald D.* does not stand for the proposition, espoused by Dr. McLeod, that a child has a constitutional right to two mothers. On the contrary, it provides exactly the opposite. In addition, the Court held that it did not need to address the issue of whether the child had a right in maintaining her filial relationship. *Id.*, at 130-31. It is simply error for a court to hold that the cases of *Michael H. v. Gerald D.* and *Lehr v. Robertson* provide E.L.M.C. with a constitutional right that eclipses her only mother's 14th Amendment rights.

CONCLUSION

Dr. Clark is the only fit, legal parent that E.L.M.C. has. Dr. Clark never did anything to relinquish custody and control of E.L.M.C.. Therefore, Dr. McLeod should not be accorded the status of "psychological parent." However, even if Dr. McLeod is given the status of "psychological parent," that status does not entitle Dr. McLeod to equal rights to the child. A child cannot have two mothers under Colorado law. Dr. McLeod is a third party, not a legal parent. Under *Troxel,* Dr. Clark's proposed parenting time plan is presumed to be in the best interest of E.L.M.C.. Because Dr. Clark has a fundamental right to direct the education, upbringing and raising of her child, strict scrutiny applies to any attempts by a court to override her parenting time plan. Dr. McLeod can overcome the presumption in favor of Dr. Clark only by proving by clear and convincing evidence that physical harm or real, serious, long-term emotional injury will result to E.L.M.C. if the court adopts the parenting time plan proposed by the child's only legal parent, Dr. Clark. Dr. McLeod cannot make such a showing.

Dated this 7th of April, 2003

ROUSE & ASSOCIATES, P.C.

By: /s/ _____
James P. Rouse

APPENDIX M

COURT OF APPEALS,
STATE OF COLORADO
Colorado State Judicial Building
2 East Fourteenth Ave., 3rd Floor
Denver Colorado 80203

Case Number 03 CA 1121

[Filed October 27, 2003]

In re the interest of E.L.M.C.	)
	)
Appellant:	)
Cheryl Ann Clark	)
	)
v.	)
	)
Appellee:	)
Elsey Maxwell McLeod	)
	)

Lower Court: District Court, Denver County
Lower Court Judge: Honorable John W. Coughlin
Lower Court Case Number 96 DR 39
Party initiating appeal: Co-Petitioner Cheryl Ann Clark

Attorneys for Appellant Cheryl Ann Clark:

Name: James P. Rouse and Amy D. Desai, Rouse & Associates, P.C.

Address: 7400 E. Orchard Road, Suite 3000,
Greenwood Village, CO 80111
Phone Number: 303-694-0694
FAX Number: 303-694-0630
E-mail: jimrouseatty@cs.com
Atty. Reg.#: 10675 (Rouse), 30112 (Desai)

OPENING BRIEF

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Statement of Issues

Dr. Clark presents the following issues for review:

1. Whether the Fourteenth Amendment of the United States Constitution precludes an award of mandated parenting time and parenting responsibilities to a non-parent (Dr. McLeod) when the child has a fit legal parent (Dr. Clark).

2. Whether Dr. McLeod (the non-parent) has standing to pursue the action below.

3. Whether the trial court erred in according a former same-sex partner the same legal status as a spouse or parent would receive in a divorce proceeding.

4. Whether the trial court erred and violated the constitutional rights of the adoptive parent, Dr. Clark, in refusing to defer to the parenting time schedule proposed by a fit, legal parent (as required by *Troxel v. Granville,* 530 U.S. 57 (2000)) and instead imposing the court's own determination of what was in the best interest of the minor child when establishing parenting time.

5. Whether the trial court erred in its findings of "special factors" in light of *Troxel.*

6. Whether the trial court's order requiring that Dr. Clark ensure that her daughter is not exposed to anything in her religious upbringing or teaching "that can be considered homophobic" violates the First Amendment and the Fourteenth Amendment of the United States Constitution and the Colorado Constitution.

Statement of the Case

A. Nature of the Case

This case involves a dispute between a fit legal parent (Appellant Dr. Clark), and her former live-in girlfriend (Appellee Dr. McLeod), over the parenting time and decision

making responsibility for Dr. Clark's adopted daughter, E.L.M.C.. The case below proceeded through the family division of the Denver District Court. The issues generally are whether the non-parent had standing and whether the correct constitutional and case law standards were applied by the District Court below.

B. Standard of Review

Because Dr. Clark appeals based on questions of law, this Court has *de novo* review. *Petron Dev. Co. v. Wash. County Bd. of Equalization,* 2003 WL 22305635 (Colo. App. 2003).

C. Course of Proceedings Below

When the parties lived together, they filed a Joint Motion for Custody in 1996. There was no case in controversy at the time and Magistrate Dupree later ruled that Joint Custody decree entered in response to the Joint Motion invalid for lack of subject matter jurisdiction.[1] After the parties' relationship failed, Dr. Clark voluntarily offered to Dr. McLeod that she continue to see E.L.M.C. every other weekend. Dr. McLeod disagreed and filed a Motion for Parenting Time with Dr. Clark's daughter. Dr. Clark filed a Response which proposed time for Dr. McLeod to see Dr. Clark's daughter every other weekend.

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[1] Because of that original Motion, however, the parties were designated as Co-petitioners in the case below. That portion of the Magistrate's July 10, 2001 order voiding the 1996 joint custody decree was never appealed. The Magistrate's Order thus became a final, non-appealable order. Therefore there is no joint custody decree in existence, and the trial court expressly refused to rely on it in the Permanent Orders.

On April 3,2001, the Magistrate, without taking any evidence, held a status conference and entered verbal temporary orders granting equal parenting time and *sua sponte* gave Dr. McLeod joint parental responsibility in spite of the fact that Dr. McLeod had never requested any parental responsibilities at all; this Order was formalized on June 5,2001. On July 10, 2001, Magistrate Dupree ruled that the United States Supreme court case of *Troxel v. Granville,* 530 U.S. 57 (2000) (hereinafter referred to as *"Troxel"*) did not control the determination of what parenting time schedule was appropriate for a minor child. The court instead applied the "best interest standard." An interlocutory appeal to this Court ensued, but the Court determined that at that time there was not a final appealable order and the case proceeded in the trial court to a modification of Temporary Orders[2] and eventually to Permanent Orders.

Dr. Clark now appeals from Permanent Orders entered on April 28, 2003, which granted her former girlfriend only slightly less than equal parenting time and joint decision making responsibility over Dr. Clark's daughter in most areas. The Court did grant Dr. Clark sole decision making authority over religious and dental decisions. Dr. Clark now appeals, arguing that the court below erred in granting any joint decision making to Dr. McLeod as a non-parent and in failing to adopt Dr. Clark's proposed parenting plan but imposing its own parenting plan instead.

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[2] The initial temporary orders called for a change of parenting time every three days. Dr. Clark motioned to modify those orders out of concern for the disruption to E.L.M.C.'s life. Following a hearing on Dr. Clark's Motion, held on July 30 and August 26, 2002, the District Judge then modified the schedule to a week-on, week-off schedule.

Statement of Facts

In 1995, Appellant, Dr. Cheryl Clark, (hereinafter referred to as "Dr. Clark") adopted a baby girl, E.L.M.C., from China. (R.T. 7/02, 15-16).[3] The adoption was finalized in Colorado on July 11, 1995. (R.T. 7/02, 15-16). Dr. Clark is E.L.M.C.'s mother, and she is her only legal parent. (R. 664-76). Dr. Clark bore the sole financial responsibility for the adoption, (R.T. 1/02, 14). Prior to and during the adoption process, Dr. Clark lived with Dr. Elsey McLeod (hereinafter referred to as "Dr. McLeod") in a lesbian relationship. (R. 586). Dr. McLeod was not an applicant for the adoption, and she agreed that Dr. Clark would be the only legal parent of E.L.M.C.. (R.T. 8/02, 62-63). Dr. McLeod told Dr. Clark that she did not want to have children (R.T. 7/02, 11-12). Dr. McLeod did not participate in the adoption application process nor the expenses. (R.T. 7/02, 13-15).

In 1996, the parties filed a petition for joint custody with the Denver District Court, which Dr. Clark believed was for the purpose of providing for E.L.M.C. in the event of Dr. Clark's death or incapacity. (R.T. 7/02, 17-18). The parties raised the minor child, E.L.M.C., in their house. (R. 586). Following her family's tradition of recognizing people who are important to the parent through children's names, Dr. Clark added the name "McLeod" as a second middle name for E.L.M.C.. (R.T. 4/03, t 19). The amount of Dr. McLeod's

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[3] The Record on Appeal consists of three volumes of pleadings and orders, with pages numbered sequentially and cumulatively, and three transcripts (dated July 2002, August 2002, and April 2003) each paginated individually. Hereinafter, the first three volumes of the Record will be designated "R." followed by the page number. The transcripts will be designated "R.T. 7/02", "R.T. 8/02" or "R.T. 4/03" followed by the page number.

involvement in raising E.L.M.C. is a matter of dispute between the parties.

Subsequently, Dr. Clark and Dr. McLeod ended their relationship and a dispute resulted over the time that Dr. McLeod demanded to spend with E.L.M.C. Dr. McLeod filed a Motion for Parenting Time, which triggered the present litigation. (R. 21). Dr. Clark filed a Verified Response and proposed a parenting time schedule that gave Dr. McLeod significant time with E.L.M.C. every other weekend from Thursday through Monday morning and Wednesday evening with the child on the off week. (R. 25-26). Dr. Clark also proposed that the schedule be modified during the summer months to allow expanded time for Dr. McLeod.

In preparation for the Permanent Orders hearing, Dr. Clark submitted a proposed parenting plan, a copy of which is attached to the Trial Management Certificate. (R. 589-97). It proposes that Dr. Clark, as the sole legal parent, be awarded sole parental responsibility for the child. Dr. Clark's plan still provides for Dr. McLeod to have significant time with E.L.M.C.. No one disputes that Dr. Clark is a fit and proper parent for her child and is the only legal parent of E.L.M.C..

A Permanent Orders hearing was held on April 14 and 15, 2003. On April 28, 2003, the trial court issued the resulting Orders which are the subject of this Appeal. (R. 664-76). The Court found Dr. Clark was a fit parent. The court stated that *Troxel* was binding on the court, then brushed aside Dr. Clark's parenting plan. Rather, the Court listed "special factors", including that the child is doing well in school and that Dr. McLeod was voluntarily brought into the child's life by Dr. Clark, as reasons to disregard Dr. Clark's parenting

plan. The Permanent Orders entered are contrary to established law and Dr. Clark Appeals.

Summary of Argument

The trial court violated Dr. Clark's rights pursuant to the Fourteenth Amendment to the United States Constitution to direct the upbringing of her child. Dr. Clark is the only fit, legal parent of E.L.M.C.. Pursuant to *Troxel,* the trial court should have deferred to the parenting time schedule set forth by Dr. Clark. The trial court noted that Dr. Clark is a fit parent and that she is the only legal parent of E.L.M.C.. Dr. Clark has not attempted to deprive Dr. McLeod of all parenting time with E.L.M.C.. Therefore, Dr. Clark is presumed to have acted in the best interests of her child. Dr. McLeod did not show, and the court did not find, that the parenting time schedule proposed by Dr. Clark is harmful to the child. Further, Dr. McLeod had no standing under Colorado law to pursue parenting responsibilities over E.L.M.C. and the court should not have granted any parenting responsibilities to a party with no standing to seek them. It is also questionable whether Dr. McLeod had standing to seek parenting time under these circumstances. Dr. McLeod's possible "psychological parent" status does not deprive Dr. Clark of her Fourteenth Amendment rights to direct the upbringing of her own child as set forth in *Troxel.* Dr. McLeod does not have the same legal and constitutional status as the adoptive parent, Dr. Clark. The court erred in substituting its own judgment for that of the fit legal parent, contrary to *Troxel* and to the Constitution. Finally, the court's order prohibiting exposure to anything in the religious training that "could be considered homophobic" violates the Free Exercise Clause and the Establishment Clause of the First Amendment, as well as the Fourteenth Amendment and the Colorado Constitution.

Argument

I. The Fourteenth Amendment grants Dr. Clark sole authority to the upbringing of her child

The United States Supreme Court has long recognized the rights of a parent to direct the upbringing of her child. There are certain liberties guaranteed by the Fourteenth Amendment to the United States Constitution. "Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer v. State of Nebraska,* 262 U.S. 390, 399 (1923). A parent's Fourteenth Amendment rights include "the liberty of parents... to direct the upbringing and education of children under their control." *Pierce v. Society of Sisters,* 268 U.S. 510, 534-35 (1925). "The child is not the mere creature of the state..." *Id.*, at 535. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Commonwealth of Massachusetts,* 321 U.S. 158, 166 (1944).

In subsequent cases, the United States Supreme Court also recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children, and that the parent-child relationship is a higher priority than any other party' s relationship to the child. "It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come(s) to this Court with a momentum for respect lacking when appeal is made to

liberties which derive merely from shifting economic arrangements.'" *Stanley v. Illinois,* 405 U.S. 645, 651 (1972)(dealing with rights of an unwed father). The State's interest in caring for the child of a natural or adoptive parent is *de minimis* if that parent is shown to be a fit parent. *Id.*, at 657-58. The United States Supreme Court has recognized that:

> The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); *See also, Quilloin v. Walcott,* 434 U.S. 246, 255 (1978)("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.").

The importance placed upon the relationship between the child and a fit, legal parent has been emphasized by the higher standard of proof required before the State can substantially interfere with the parent's constitutional rights. *See, Santosky II v. Kramer,* 455 U.S. 745,766-67 (1982) (a "clear and convincing evidence" standard of proof is the minimal standard of proof required to satisfy due process in a termination of parental rights hearing). The due process clause of the Fourteenth Amendment provides heightened protection against government interference with certain fundamental rights and liberty interests, including the right to have children and to direct the education and upbringing of one's children. *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997).

Dr. Clark's Fourteenth Amendment right to the care and control of her own child includes her decisions as to who her daughter spends time with. As Justice Stevens observed in his concurring opinion in *Troxel,*

> The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character. Whether for good or for ill, adults not only influence but may indoctrinate children, and a choice about a child's social companions is not essentially different from the designation of the adults who will influence the child in school. Even a State's considered judgment about the preferable political and religious character of schoolteachers is not entitled to prevail over a parent's choice of private school. *Pierce, supra*, at 535, 45 S.Ct. 571 ... It would be anomalous, then, to subject a parent to any individual judge's choice of a child's associates from out of the general population merely because the judge might think himself more enlightened than the child's parent.

Troxel at 78-79.

The prior relationship between Dr. Clark and Dr. McLeod is the type of "shifting economic arrangement" that is not entitled to the constitutional protection that the Supreme Court of the United States has consistently granted to the relationship between a legal parent (whether adoptive or biological) and child. *See, People in the Interest of A.W.R.*, 17 P.3d 192, 197 (Colo. App. 2000), *certiorari denied.* (Foster mother's relationship with child did not give rise to a constitutionally protected liberty interest.).

In declining to adopt Dr. Clark's parenting plan for her child, without any finding of unfitness nor that Dr. Clark is not acting in her child's best interests, the trial court failed to recognize Dr. Clark's fundamental constitutional rights as a parent. Indeed, the state - through the trial court - has impermissibly interfered with Dr. Clark's fundamental rights with no justification and no evidence (whether clear and convincing or otherwise) that there was any compelling state interest to so interfere.[4] The trial court thus violated Dr. Clark's Fourteenth Amendment rights and failed to recognize and uphold the constitutional protection of the parent-child relationship. *Quilloin, supra.*

II. Dr. McLeod Lacks Standing

A. *parental responsibilities*

Dr. McLeod does not have standing to seek parenting responsibilities over E.L.M.C. under C.R.S. § 14-10-123, and as such she should not have been granted parenting responsibilities *sua sponte*. That part of the permanent orders regarding joint decision making responsibilities should be vacated and Dr. Clark's position as sole decision-maker should be restored. C.R.S. § 14-10-123(1)(b), (c) and (d) set out the standards under which non-parents may have standing to seek parental responsibilities, and states:

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[4] While the trial court did state that it found the existence of six factors (discussed in later sections of this brief) with clear and convincing evidence, it did not find that those factors presented a compelling state interest, nor *any* state interest, in interfering with Dr. Clark's parental rights.

> 1) A proceeding concerning the allocation of parental responsibilities is commenced in the district court or as otherwise provided by law:
>
> ...
>
> (b) By a person other than a parent, by filing a petition seeking the allocation of parental responsibilities for the child in the county where the child is permanently resident or where the child is found, but only if the child is not in the physical care of one of the child's parents;
>
> (c) By a person other than a parent who has had the physical care of a child for a period of six months or more, if such action is commenced within six months of the termination of such physical care; or
>
> (d) By a parent or person other than a parent who has been granted custody of a child or who has been allocated parental responsibilities through a juvenile court order entered pursuant to section 19-1-104 (6), C.R.S., by filing a certified copy of the juvenile court order in the county where the child is permanently resident. Such order shall be treated in the district court as any other decree issued in a proceeding concerning the allocation of parental responsibilities.

Subsections (b) and (d) clearly do not apply to this case. Since her adoption in 1995, E.L.M.C. has always been in the physical care of her mother, Dr. Clark, therefore subsection (b) does not apply. ("Subsection (b) establishes that *any* non-parent has standing as long as the child is not in the physical care of a parent." *In the Interest of K.M.B.*, 2003 WL 22309061 (Colo. App. 2003)). No orders have been sought or entered under Title 19, thus by its plain language subsection

(d) does not apply. While subsection (c) is not as clear on its face, as construed it also does not apply to this case.

One division of the Court of Appeals observed that the two subsections, (b) and (c), could be read together, in that "the former section permits the non-parent to commence the proceeding while the child is in the physical custody of the non-parent and the latter permits the proceeding to be commenced up to six months after physical custody has terminated." *A.D.C.*, 969 P.2d 708, 709 (Colo. App. 1998). A different division of the Court of Appeals clarified that a non-parent need not have physical custody to have standing if the child was not in the care of a parent. *K.M.B., supra.* In that respect, the two subsections are separate grounds for standing.

Subsection (c) has been interpreted to allow standing not only the case of complete absence of a parent but also situations where the child's parent continues to have minimal contact with the parent. Where the parent "has maintained contact with the child, including occasional overnights, [that contact] does not necessarily defeat a non-parent's standing to seek legal custody [under the statute]. In such a case, the court must consider the nature, frequency, and duration of contacts between the parent and the child." *In re Custody of A.D.C., supra,* at 710. Those cases are nearly opposite from situations such as the present case, where Dr. Clark has at all times maintained physical care of her child.

That Dr. McLeod lived in Dr. Clark's home for a time is not a basis for granting her standing under subsection (c). Only one case allowed a non-parent to have standing under subsection (c) where a parent also maintained physical care of the child, and the facts of that case are clearly distinguishable. A division of the Court of Appeals in the pre-*Troxel* case of

In re Marriage of Dureno, 854 P.2d 1352 (Colo. App. 1993) found that visitation rights could be awarded to a stepparent in a divorce proceeding. While the language of that opinion could be read broadly to include non-married third parties, the facts of that case suggest that such a reading would be dicta. No other case has cited *Dureno* for such a proposition, and, as explained below, the absence of a marriage in this case is a vital distinction. No Colorado appellate opinion has read subsection (c) to give standing to a non-parent, non-spouse when the facts are as they are in this case.

Nevertheless, even if the trial court had found that Dr. McLeod had standing under subsection (c) because she lived with Dr. Clark and E.L.M.C., Dr. McLeod would have had to have filed a motion for parental responsibilities within six months after she ceased to live with them. Dr. McLeod did not do so. Rather, recognizing that she lacked standing for parental responsibilities, she sought only parenting time. Thus, Dr. McLeod fails to have standing even under a very loose interpretation of subsection (c).

While Dr. McLeod has lived with the child and her mother, she is not a stepparent, but rather was a live-in girlfriend. She has no legal relationship to E.L.M.C., and E.L.M.C.'s legal parent has not relinquished care of her daughter. Thus, Dr. McLeod has no standing to take parenting responsibilities away from E.L.M.C.'s legal parent, with whom E.L.M.C. has always resided and continues to reside. To interpret the statute otherwise would not only be contrary to the intent of the statute, it would also violate the legal parent's fundamental right to raise her child, as described above. The cases examining psychological parent status have consistently held that the child must be out of the physical care of her legal parent before a non-parent may have standing to seek parental responsibilities. *See, e.g., In re*

Matter of C C.R.S., 892 P.2d 246, 251-252 (Colo. 1995), *In re the Matter of V.R.P.F. and S.R.P.*, (Colo. App. 1997)); *see also, Root v. Allen,* 151 Colo. 311,377 P.2d 117 (1962), (where stepfather given custody over objection of biological father where biological father had no contact with child for more than six years).

Because Dr. McLeod lacked standing to seek parenting responsibilities, that part of the Permanent Orders granting Dr. McLeod joint parenting responsibilities over all decision making other than dental and religious should be vacated. Dr. Clark, as the only fit legal parent, is the only individual with the legal right to and responsibility for decision making over her daughter. "The determination of parenthood includes... the right to make decisions regarding the control, education, and health of the child". *N.A.H. v. S.L.S.*, 9 P.3d 354, 359 (Colo. 2000), citing *Michael H. v. Gerald D.*, 491 U.S. 110, 118-19, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989).

B. parenting time

Likewise, as a non-parent, Dr. McLeod has no standing to pursue parenting time with E.L.M.C. while E.L.M.C. resides with her mother and there is no evidence of unfitness. Dr. McLeod filed her petition for parenting time pursuant to C.R.S. § 14-10-124. However, C.R.S. § 14-10-124 applies to parties to a divorce and to parents of children. (It also applies to non-parents under Title 19 dependency and neglect actions and placement after termination of parental rights.) While courts have recognized non-parent, non-spouse standing under cases such as *C.C.R.S., supra,* the facts in those cases have always been consistent with and tied to the factors in § 14-10-123(b) or (c), and the child was not in the care of the parent. Such special factors are consistent with *Troxel.* The legislature has determined that grandparents should also have a right to

parenting time under some circumstances, and the legislature enacted C.R.S. § 14-10-123.3 to meet that goal. However, no such provision has been enacted to allow for visitation by former roommates, former boyfriends or girlfriends, nannies, or former lesbian partners. Such an expansion would have broad policy implications and should be left to the legislature to consider.

While the Colorado Courts have recognized that stepparents may seek parenting time under C.R.S. § 14-10-124 *(Dureno, supra.),* counsel is unaware of any Colorado cases allowing a live-in boyfriend or girlfriend to have parenting time with the parent' s child after the boyfriend or girlfriend moves out and the parent is fit (i.e.- where there are no concerns for the safety of the child). With a live-in non-spouse, the parent has created no legal relationship and has no notice or expectation that the parent could suffer legal consequences resulting in lost time with her child.

Courts in other states have refused to grant visitation or parenting time to the lesbian ex-partner of a child's biological or adoptive mother, even when the ex-partner claimed or was found to have the status of a psychological parent or de facto parent.

In re Thompson, 11 S.W.3d 913 (Tenn.App. 1999) involved two cases consolidated on appeal. In both cases, the former lesbian partner had contributed to the raising and financial support of the child. The children were named after both parties to the relationship. The lesbian non-parents claimed to be *de facto* parents and also alleged rights to visitation under the doctrine of *in loco parentis.* The court rejected the claimed right to visitation by non-parent former lesbian partners based upon the status of *de facto* parent and *in loco parentis. Id.,* at 923. ("we are unaware of and have

not been cited to any prior controlling precedent that has utilized the concept of either *de facto* parenthood and/or *in loco parentis* to extend constitutional parental rights, including the right to visitation, to unmarried/unrelated persons....").

Several California decisions have held that the former lesbian partner of the legal mother of a child has no right to visitation with the child. *Guardianship of Z.C.W. and K.G.W.*, 71 Cal.App.4th 524, 527-28, 84 Cal.Rptr.2d 48, 50 (1999)(former lesbian partner claiming de facto parent status cannot prevail on her argument that she is entitled to visitation rights nor can she use a guardianship proceeding to obtain visitation); *West v. Superior Court,* 59 Cal.App.4th 302, 306, 69 Cal.Rptr.2d 160, 162 (1997); *Nancy S. v. Michele G.,* 228 Cal.App.3d 831, 836-39, 279 Cal.Rptr. 212, 215-18 (1991)(former lesbian partner claiming to be "psychological parent," claiming to be de facto parent, and claiming in loco parentis status had no standing to seek visitation with child of former partner); *Curiale v. Reagan,* 222 Cal.App.3d 1597, 1600-01,272 Cal.Rptr. 520, 522 (1990)("Given the complex practical, social and constitutional ramifications of the [de facto parent] doctrine, we believe the Legislature is better equipped to consider expansion of California law should it choose to do so.").

The Supreme Court of Vermont, in the case of *Titchenal v. Dexter,* 166 Vt. 373, 693 A.2d 682 (1997), dealt with a situation that was factually almost identical to the case before this court. The plaintiff, Chris Titchenal, and the defendant, Diane Dexter, began an intimate relationship with each other. They purchased a home together, held joint bank accounts, and jointly owned their automobiles. They both contributed financially to their household, and each regarded the other as a life partner. They decided to have a child and the defendant

adopted a newborn baby. The parties held themselves out to the child and others as her parents. The child called one "Mama Chris" and the other "Mama Di." For the first three and one-half years of the child's life, the plaintiff cared for the child approximately 65% of the time. Plaintiff did not seek to adopt the child because the parties believed the then-current adoption statute would not allow both of them to do so. Eventually the parties' relationship ended. The defendant severely curtailed the plaintiff's contact with the child. Plaintiff filed a complaint to obtain regular, unsupervised parent-child contact between her and the child. The Vermont Supreme Court ruled that the plaintiffs claim of being an equitable or de facto parent did not entitle her to have visitation with the child over the adoptive mother's objections. *Id.*, 166 Vt. at 377-78, 693 A.2d at 685.

The Maryland Court of Special Appeals has held that a de facto parent with a significant relationship with the child was still just a third party for purposes of determining visitation. *S.F. v. M.D.*, 132 Md.App. 99, 114, 751 A.2d 9, 16-17 (2000) (holding that former lesbian partner of child's biological mother was not entitled to visitation under the circumstances of that case). A psychological parent is not entitled the same rights as a biological or adoptive parent. *Kazmierazak v. Query,* 736 So.2d 106, 110 (Fla. 4th DCA 1999). Therefore, a psychological parent is not entitled to visitation over the objection of the child's biological mother. *Id; see also, Music v. Rachford,* 654 So.2d 1234 (Fla. 1st DCA *1995);Alison D. v. Virginia M.,* 155 A.D.2d 11,15, 552 N.Y.S.2d 321,324 (1990).

The precedent set by the trial court's decision would deprive legal parents of time with their children in favor of third parties who have no legal relationship to the child or the parent. It would give standing to every boyfriend, nanny, or

uncle who spends time in the home to seek "parenting time" with the child, even when, as here, the child's parent is fit and there is no indication of harm to the child. The order below should be vacated for lack of standing.

III. The trial court erred in equating Dr. McLeod to a spouse in a divorce proceeding or to a parent of the minor child

While the trial court did not explicitly state that it viewed Dr. McLeod as a spouse of Dr. Clark, the court's reasoning in this case reveals that it did improperly treat the parties as though they were married, and improperly dealt with parenting issues as if Dr. McLeod were a parent. But Dr. McLeod is not a legal parent. There was no legal relationship between Dr. McLeod and Dr. Clark, nor is there a legal relationship between Dr. McLeod and E.L.M.C..

State law, like nature itself, makes no provision for E.L.M.C. to have two mothers. *See Michael H. v. Gerald D.*, 491 U.S. 110, 118 (1989) ("California law, like nature itself, makes no provision for dual fatherhood."). There is no legal parental relationship between Dr. McLeod and E.L.M.C., and there is no legal relationship between Dr. McLeod and Dr. Clark such as there is between a married man and woman in Colorado. Obviously Dr. McLeod is not E.L.M.C.'s natural parent. Dr. McLeod could not adopt E.L.M.C. under Colorado law, and she never attempted to do so. *See,* C.R.S. § 19-5-202. Just as a live-in boyfriend, an aunt, or a nanny cannot overcome the rights of a fit legal parent, neither can Dr. McLeod usurp Dr. Clark's rights as E.L.M.C.'s mother. It is the traditional family that western law and culture has bestowed protection upon. *See Wisconsin v. Yoder, supra,* at 232 ("The history and culture of western civilization reflect

a strong tradition of parental concern for the nurture and upbringing of their children.").

Only when the traditional mother and father have not conducted themselves properly or have for some reason become unfit parents, such as through abuse of the children, neglect of the children, abandonment of the children, or conviction of crimes, has the court seen fit to allow the claims of non-parents in a parent-like relationship with the child to supersede the fundamental rights of the natural, or legal parent. *See Quilloin v. Walcott, supra,* at 255 (father who had never had, nor sought, actual or legal custody of his child did not have his constitutional rights infringed when court allowed adoption by people who been acting as child's parents). Indeed, the United States Supreme Court has noted that the absence of a legal tie with the legal parent places a limit on whatever substantive constitutional claims might exist by virtue of the other party's actual relationship with the children. *Lehr v. Robertson,* 463 U.S. 248,260, n.16 (1983). Any other decision puts E.L.M.C. at risk of having numerous "psychological parents" control her life, without the knowledge or consent of the legal, adoptive parent. E.g., *In re the Marriage of Martin,* 43 P.3d 75, 77 (Colo. App. 2002). "Indeed, many courts and commentators have noted the potential dangers of forcing parents to defend third-party visitation claims." *Titchenal v. Dexter, supra,* 166 Vt. at, 382, 693 A.2d at 687.

Dr. McLeod's third party, non-spouse, non-parent status is simply not equivalent to Dr. Clark's legal-parent status in light of controlling Colorado precedent. It is a child's legal parent who enjoys the rights and responsibilities of legal parenthood. *N.A.H. v. S.L.S., supra.* "The determination of parenthood includes the right to parenting time; the right to direct the child's activities; the right to make decisions

regarding the control, education, and health of the child; and the right to the child's services and earnings." *Id.* at 359. Legal parenthood "imposes significant obligations as well, including the obligation of support and the obligation to teach moral standards, religious beliefs and good citizenship." *Id.* The Colorado Supreme Court has held that "although a child can certainly have emotional attachments to more than one father figure, she can have only one legal father." *Id.*, at 360 (citing *Michael H. v. Gerald D., supra).* By inference, a child can also have only one legal mother. In E.L.M.C.'s case, that legal mother is Dr. Clark, not Dr. McLeod. Under the rationale of *N.A.H. v. S.L.S.,* only Dr. Clark has the right to make decisions regarding E.L.M.C.. The U.S. Supreme Court holding in *Troxel* requires this. The trial court thus erred in its failure to defer to Dr. Clark's parenting plan.

IV. *Troxel* Requires that the Court Defer to the Parenting Time Schedule Proposed by Dr. Clark.

The United States Supreme Court again addressed the fundamental right of a legal parent to direct the upbringing of the parent's child in *Troxel.* That particular case involved visitation by grandparents enforced by the court against the will of the mother.

The United States Supreme Court stated that, "so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel, supra,* at 68-69. Here, there is no reason for the state, through the district court's order, to inject itself into Dr. Clark's life and dictate how she must raise her child. As in *Troxel,* no one in this case has alleged that Dr. Clark is an unfit parent. Dr. Clark is the

only legal parent of the child. She is the child's adoptive parent. As a result, pursuant to C.R.S. § 19-5-211 (1), Dr. Clark has all of the rights and responsibilities of a natural parent. Dr. McLeod does not have this status. Dr. McLeod did not adopt E.L.M.C., Dr. Clark did. Dr. McLeod could have adopted a child of her own had she wished to be a mother to a child. Having failed to do so, she now cannot simply usurp the parental rights of Dr. Clark and obtain a child by taking one from her mother.

In *Troxel,* the Court observed that the fit, legal parent did not seek to cut off visitation by the grandparents entirely. *Troxel, supra,* at 71. Here, too, Dr. Clark has not sought to deprive Dr. McLeod of parenting time altogether. In fact, Dr. Clark proposed a "traditional parenting time plan."[5] Dr. Clark's plan is reasonable and the trial court did not find that Dr. Clark's plan is somehow not in the best interest of the child. The trial court simply substituted its own judgment and plan instead.

"[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Troxel, supra,* at 72-73. However, that is precisely what the state judge did in this case. In *Troxel* the case involved nothing more than a simple disagreement between the Washington trial court and the mother regarding her children's best interests. *Id.,* at 72. As such, the Supreme Court found that the trial court should have

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[5] Dr. Clark's plan proposes that Dr. McLeod spend decreasing time with E.L.M.C.. Dr. Clark' s plan is based, in part, on the case of *In re Parental Responsibilities Concerning K.L.M.D.*, Adams Co. Dist. Ct. Case No. 99DR1644, affirmed by 2002 WL 31126798.

deferred to the decision of the fit, legal parent. So too, this case is nothing more than a disagreement between the trial court judge and Dr. Clark as to how much time and responsibility Dr. Clark should give to third parties with respect to Dr. Clark's daughter. The trial court should have deferred to Dr. Clark's parenting plan.

V. The trial court erred in applying "special factors" to overcome *Troxel*

The trial court recognized that *Troxel* is binding precedent, but went on to state, "[t]his Court, however, is free to determine 'special factors', override Dr. Clark's position and to determine by clear and convincing evidence that any presumption due Dr. Clark's position is outweighed in determining the best interest of the minor child." The court cited no authority for this conclusion. However, it can be assumed that the court was referring to the *Troxel* court's observation that the trial court's order granting visitation to third parties "was based on precisely the type of mere disagreement we have just described and nothing more. The [trial court's] order was not founded on any special factors that might justify the State's interference with Granville's fundamental right to make decisions concerning the rearing of her two daughters." *Troxel* at 68. The Supreme Court did not explain what it meant by the phrase "special factors" but it immediately turned to a discussion of parental fitness, stating "Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel* at 68-69, citing *Reno v. Flores,* 507 U.S., 292, 304, 113 S.Ct. 1439 (1993). The most fair reading of this language is that without the "special factors" of unfit parents or other

harm to the child, a court must defer to the legal parent's decisions.

In this case, the trial court's order goes against the clear language of *Troxel* that the court is not to substitute its own judgment for that of the fit legal parent. None of the benign "special factors" cited by the trial court address any sort of harm to the child, nor unfitness of the parent, Dr. Clark.

The trial court listed six factors in support of its disregard of Dr. Clark's fundamental rights. Those factors were that: Dr. Clark entered the joint petition for custody (which was declared void and which was *expressly* not relied upon by the trial court); Dr. Clark changed the child's name, adding McLeod as a middle name; Dr. Clark entered a joint parenting plan for the child (as a result of the court proceedings); Dr. Clark permitted and encouraged Dr. McLeod' s participation in raising the child and encouraged bonding between the two; the child recognizes the parties as her "parents,"[6] and is doing very well in school and in every other way. The court further noted that Dr. Clark participated in creating these factors and that "she may not now ask this Court to disregard these factors." However, to take the court's determination to its logical end, this means that any parent who involves any other adult in their child's life cannot

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[6] As support for this factor, the court cites "Exhibit 1 where the minor child states 'I love my mommy and momma.'" However, it is clear that no first grader could write in such penmanship as is used in Dr. McLeod' s Exhibit 1, and there was no testimony supporting the court's finding that the child wrote it. This was an abuse of discretion. The Exhibits were designated for the Record on Appeal but were not yet transferred to the Court of Appeals. Appellant has filed a Motion seeking their inclusion as a supplement.

thereafter change their mind about such involvement. Those parents who take nannies into their homes encourage the nanny's involvement with their children, encourage bonding with the nanny, and have a happy well-adjusted child are now subject to losing their parental rights over the child - or, at a minimum - having to share them equally - with the nanny. This is clearly not the intent of *Troxel.* A fair reading of *Troxel* reveals that "special factors" must be related to endangerment to the child or other issues of fitness of the parent. Those concerns do not apply in this case; thus, the court erred in failing to follow *Troxel* because of "special factors."

VI. Post *Troxel* decisions support Dr. Clark's right to determine parenting time that her child has with a non-parent.

To the extent that *C.C.R.S., In re the Custody of A.D.C., supra, and In re Marriage of Dureno, supra,* stand for the proposition that the fitness of a parent has no bearing on the determination of what is in the best interests of a child and/or that the fit legal parent is not presumed to act in the best interests of her child and/or that the court need not defer to the wishes of a fit legal parent, they are no longer good law because of the United States Supreme Court decision in *Troxel.* Further, the Colorado Court of Appeals, in interpreting *C.C.R.S.,* has explicitly ruled that even in the context of cases involving "psychological parents," the fundamental liberty interest of the fit legal parent gives rise to a presumption that the best interests of the child will be furthered by the decisions of the fit legal parent. *People ex rel A.M.K.* 68 P.3d 563,565 (Colo. App. 2003). The Colorado Court of Appeals has also addressed *Troxel* issues in the context of parenting cases.

"One of the relevant factors in determining a child's best interests is the 'wishes of the child's parents as to parenting time.' Section 14-10-124(1.5)(a)(1), C.R.S." *In re Custody of C.M.*, 74 P.2d 342, 345 (Colo. App. 2002). The best interests standard, which is the guiding principal in awarding custody even in disputes involving non-parents, is subject to the presumption that the legal parent has a first and prior right to custody. *Id.* This presumption does not extend to non-parents, even though the non-parent may have been involved in the child's life on a daily basis. *In the Matter of the Petition of M.G.*, 58 P.3d 1145, 1147 (Colo. App. 2002) (fundamental liberty interesting rearing children does not belong to a guardian). Where there is a dispute over parenting between psychological parents and the legal parent, the court cannot ignore or brush aside the presumption accorded to the legal parent. *People ex rel A.M.K., supra.*

Courts in other states have also dealt with this issue in light of the United States Supreme Court's decisions in *Troxel.* There is a "constitutionally based preference that a parent, rather than a non-parent, have custody of his or her child where that parent has not been shown to be unfit." *Harris v. Smith,* 752 N.E.2d 1283, 1290 (Ind.Ct.App. 2001). In the absence of allegations that the legal parent is unfit, the court is required pursuant to *Troxel* to presume that the visitation schedule proposed by the legal parent is in the best interests of the child. *Crockett v. Pastore,* 259 Conn. 240, 249, 789 A.2d 453,458 (2002). Further, to pass constitutional muster, even if the third party is in a "parent-like relationship" with the child, the third party seeking visitation must show that the child would suffer real and significant harm from the visitation schedule proposed by the legal parent. *Id.*, 259 Conn. at 249, 789 A.2d. at 459. Dr. Mcleod failed to do this.

The *Troxel* decision requires a court to "presume that a fit parent's decision is in the best interest of the child." *Crafton v. Gibson,* 752 N.E.2d 78, 96 (Ind.Ct.App. 2001); *see also, State Dep 't. of Soc. and Rehab. Services v. Paillet,* 16 P.3d 962, 970-71 (Kan. 2001). "Thus, the best interests determination cannot be left solely to the trial court's discretion without considering and giving deference to a fit parent's decision." *Crafton v. Gibson, supra.* Where there is no allegation that the legal parent is not a fit parent, "the trial court was required under *Troxel* to give special weight to her decision." *Id.* "Additionally, the *Troxel* court indicated that a trial court should give some weight to a fact that a parent has agreed to some visitation." *Id.* Here, the trial court failed to do this.

Absent a finding of unfitness or neglect by the legal parent, a pure best interests test (i.e., one that denies the fit legal parent the presumption that she is acting in the best interests of her child) would violate the legal parent's constitutional rights. *Brewer v. Brewer,* 533 S.E.2d 541,548 (N.C. App. 2000)(citing *Troxel).* In *Brewer v. Brewer,* the court held that it would violate a legal parent's due process right to deny her the presumption that she acts in the best interests of her child where she has not voluntarily or involuntarily relinquished custody to a third party, had never been adjudged unfit, and had never acted in a manner inconsistent with her protected parental status. *Id.,* 533 S.E.2d at 548. Dr. Clark never relinquished custody of her child to Dr. McLeod. She simply allowed Dr. McLeod to participate in her life and the life of her daughter. Dr. Clark has never been adjudged unfit, nor has she ever acted in a manner inconsistent with her protected parental status.

VII. The trial Court violated the Federal and State Constitutions in ordering that Dr. Clark make sure there is nothing in the religious upbringing of the child that can be considered homophobic

The trial court heard extensive testimony as to the definition of homophobia and expert testimony that religious conservatives are not typically homophobic in their behavior, even if they view homosexual activity as morally wrong. Dr. McLeod alleged that because Dr. Clark's church had materials in its foyer that were published by Focus on the Family and by Promise Keepers, that the church was somehow improper. The court did not find fault with Dr. Clark's choice of church, nor did it order her to take her child to a different church. The Court however did order "that Dr. Clark make sure that there is nothing in the religious upbringing or teaching that the minor child is exposed to that can be considered homophobic" in the Permanent Orders.

While Dr. Clark has no intentions of exposing her child to anything inappropriate, the order itself is a breathtakingly broad restriction on the fundamental rights of Dr. Clark and her daughter. This portion of the order violates Dr. Clark' s Fourteenth Amendment rights to direct the religious upbringing of her child (as described above), and it violates Dr. Clark's and E.L.M.C.'s rights to the Free Exercise of religion and to free speech under both the federal and state constitution,[7] while at the same time violating the

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[7] Dr. Clark appeals on her Art. II, Sec. 4 rights under the Colorado Constitution as a separate basis for relief. Colorado's Freedom of Religion is substantially the same as the federal right and analyzed under the same legal principals. *See Young Life v. Division of Emp. and Training,* 650 P.2d 515, 526 (Colo. 1982).

Establishment Clause of the First Amendment.[8] The order also violates E.L.M.C.'s First Amendment right to receive information, as well as Dr. Clark's First Amendment right to free speech with her own daughter. In this area, Dr. Clark's rights under Article II, § 10 of the Colorado Constitution are greater than those under the First Amendment. *Lewis v. Colorado Rockies Baseball Club, Ltd.*, 941 P.2d 266, 271 (Colo. 1997).

The United States Supreme Court has established a long line of precedent recognizing that the First Amendment encompasses the right to receive information as well as to speak it. "Our precedents have focused 'not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.'" *Board of Educ., Island Trees Union Free Sch .Dist. No. 16 v. Pico,* 457 U.S. 853,866 (1982), quoting *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765,783 (1978). The *Pico* Court, in a case in which the Court determined that students can state a claim against a school district for removing books from the school library, went on to state, "In keeping with this principle, we have held that in a variety of contexts 'the Constitution protects the right to receive information and ideas.'" *Id.* at 866-67, quoting *Stanley v. Georgia,* 394 U.S. 557, 564 (1969). That right applies to children as well as adults, as it has been applied in school settings. The trial court is violating this right by unreasonably restricting E.L.M.C.'s access to information in her religious training, which can occur in church, or school, or the home.

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[8] *See*, Colo. Const. art. II, § 4; U.S. Const. amend. I; U.S. Const. amend. XIV

E.L.M.C.'s rights to free information are not based on whether or not she is a student, but on whether she is a person entitled to the protections of the constitution. "Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511 (1969).

Further, the state cannot get into the business of approving which churches Dr. Clark may attend with her daughter, what theology or doctrine Dr. Clark and E.L.M.C. may study or believe, nor can it create a state-approved list of which churches are homophobic and which are not, nor which teachings are homophobic and which are not, nor can the state even prohibit churches from teachings which the state considers homophobic. To do so would be excessive entanglement by the state into matters of religion, violating the Establishment Clause of the First Amendment. *See Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971); *Van Osdolv. Vogt,* 908 P.2d 1122 (Colo. 1996).

The order would also violate the related principal of church autonomy over matters of doctrine. As indicated by the Supreme Court in a long line of cases, the "'church autonomy doctrine' prohibits civil court review of internal church disputes involving matters of faith, doctrine, church governance, and polity." *See Bryce v. Episcopal Church in the Diocese of Colorado,* 289 F.3d 648,655 (10th Cir. 2002). In contrast, the trial court's order here requires the trial court

to rule on whether or not the church teachings are proper, i.e., not "homophobic."

While religious beliefs may be relevant in custody proceedings where such beliefs are likely to cause present or future harm to the child, *In re Marriage of Short,* 698 P.2d 1310 (Colo. 1985), here, there was absolutely no such evidence. Neither did Dr. McLeod allege that there would be any harm to E.L.M.C. from Dr. Clark's church. Dr. McLeod simply testified that she did not think Dr. Clark's church was appropriate because it had Promise Keepers pamphlets in the foyer. There was no evidence as to what "homophobic" teachings are, nor that such teachings are so harmful as to preclude E.L.M.C.'s First Amendment right to information, nor that Dr. Clark' s church engages in "homophobic" teachings. In fact, the only expert evidence on homophobia was that conservative religious individuals tend to disagree with homosexuality as a moral choice, but that they *are not* homophobic in their behaviors.

Again, the only means of enforcing this portion of the Order is for the court to make assessments of the religious tenants of the churches and individuals Dr. Clark exposes her daughter to. This is not permissible. "Courts are precluded by the free exercise of religion clause from weighing the comparative merits of the religious tenets of the various faiths or basing its custody decisions solely on religious considerations... We reiterate that a court may not properly inquire into or make judgments regarding the abstract wisdom of a particular religious value or belief." *Marriage of Short,* 698 P.2d at 1313. This portion of the permanent orders should be vacated, as there is no means to interpret or enforce it without violating the First Amendment.

Conclusion

WHEREFORE, Appellant Dr. Clark respectfully requests the Court REVERSE the decision of the trial court and DISMISS the case below as Dr. McLeod does not have standing, or, in the alternative, to REVERSE the decision of the trial court, VACATE the current Permanent Orders, and REMAND the case with instructions that the trial court forthwith enter Orders adopting Dr. Clark's proposed parenting plan and allotting all decision making authority to Dr. Clark, who is the fit legal parent of the child.

Respectfully submitted this 27 day of October, 2003.

ROUSE & ASSOCIATES, P.C.
/s/ _____
James P. Rouse, 10675
Amy D. Desai, 30112
Attorneys for Appellant Dr. Clark
7400 E. Orchard Rd., Ste. 3000
Greenwood Village CO 80111
(303) 694-0694

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 27 day of October, 2003, s/he served the foregoing *Opening Brief* by depositing a copy of the same in the United States Mail, first-class postage prepaid, addressed to:

Gina B. Weitzenkorn
Mills & Weitzenkorn, P.C.
1441 18th Street, Suite 150
Denver, CO 80202

/s/ _____

APPENDIX N

SUPREME COURT,
STATE OF COLORADO
Colorado State Judicial Building
2 East Fourteenth Ave., 4th Floor
Denver Colorado 80203

Case Number 04 SC 528

[Filed August 11, 2004]

In re the interest of E.L.M.C., a Child	)
Cheryl Ann Clark, Petitioner	)
v.	)
Elsey Maxwell McLeod, Respondent	)

Court Below: Colorado Court of Appeals,
Case No. 03CA1121
Trial Court: District Court, City and County of Denver,
Case Number 96 DR 39, Division 21, Honorable John W. Coughlin

Attorneys for Petitioner Cheryl Ann Clark:
Name: James P. Rouse and Amy D. Desai,

Address: Rouse & Associates, P.C.
7400 E. Orchard Road, Suite 3000,
Greenwood Village, CO 80111
Phone Number: 303-694-0694
FAX Number: 303-694-0630
E-mail: jrouse@rouseandassoc.com
Atty. Reg.#: 10675 (Rouse), 30112 (Desai)

PETITION FOR A WRIT OF CERTIORARI

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ISSUES PRESENTED FOR REVIEW

1. Does the fact that a child's fit legal parent has shared the physical care of and decision making for her child with a third party for more than six months give the third party standing pursuant to C.R.S. § 14-10-123(1)(c) to petition for

an allocation of parental responsibilities when the sole fit legal parent of the child has always had and fully participated in the physical care of the child and properly cared for the child?

2. Does the trial court's grant of equal decision making on all facets of a child's life, except religious upbringing and dental care, to the former same-sex partner of the child's fit legal mother violate this Supreme Court's holding in *N.A.H. v. S.L.S.*, 9 P.3d 354, 359 (Colo. 2000) that a child can have only one legal parent of each sex and that it is the legal parent who makes decisions for the child?

3. Does the "psychological parent" standard announced by the Court of Appeals violate the Fourteenth Amendment to the United States Constitution?

4. Is the mere fear of risk of emotional harm to a child, without any evidentiary proof of such harm, a sufficient "special factor" to allow a court to disregard the fit legal parent's presumption that he/she is acting in the best interest of the child as set forth in *Troxel v. Granville,* 530 U.S. 57 (2000)?

5. Does a court violate the Fourteenth Amendment to the United States Constitution when it applies C.R.S. §14-10-123 in such a way as to deprive a child's sole fit legal parent, who has always properly cared for her child and had the physical care of her child, of sole decision making for the child simply because a third party has been found by the court to be a "psychological parent" or has shared in the physical care of and decision making for the child?

OPINION BELOW

The Court of Appeals entered its opinion and judgment on July 1, 2004. The opinion is designated for publication but has not been published in the Pacific Reporter yet. A copy of that opinion and judgment is included in the Appendix.

GROUNDS ON WHICH THE SUPREME COURT'S JURISDICTION IS INVOKED

A. Date of Judgment or Decree sought to be reviewed: The Court of Appeals entered its opinion and judgment on July 1, 2004.

B. Date of Orders respecting rehearing and orders granting extension of time to petition for certiorari: Petitioner elected not to file a Petition for Re-hearing. The deadline for filing a Petition for Re-hearing expired on July 15, 2004.

STATEMENT OF THE CASE

Petitioner Cheryl A. Clark ("Dr. Clark") adopted E.L.M.C. from an orphanage in China in 1995. Respondent Elsey M. McLeod ("Dr. McLeod") accompanied Dr. Clark to China, but she is not legally the adoptive parent of E.L.M.C. Later in 1995, Dr. Clark had the adoption confirmed in the courts for the City & County of Denver.

In 1996, the parties presented a joint, stipulated petition to the Denver District Court requesting that they both be granted "custody" of E.L.M.C. The Denver District Court granted the joint petition for joint custody on March 25, 1996.

Dr. Clark proceeded to raise her child and involved Dr. McLeod in the child's life. When the relationship between the Petitioner and Respondent deteriorated, Dr. McLeod filed a Verified Motion for Establishment of Parenting Time Schedule pursuant to C.R.S. § 14-10-124 on February 22, 2001. On March 9, 2001, Dr. Clark filed a Verified Motion for Temporary Orders.

Ultimately a permanent orders hearing was held, and on April 28, 2003, the District Court entered permanent orders. The permanent orders granted nearly 50/50 parenting time to Dr. McLeod and joint decision making, except for the areas of religion and dental care. With regard to religion, the Court required "that Dr. Clark make sure that there is nothing in the religious upbringing or teaching that the minor child is exposed to that can be considered homophobic." The Trial Court found "special factors" that overcame Dr. Clark's presumption of acting in the best interests of her child pursuant to the case of *Troxel v. Granville,* 530 U.S. 57 (2000). The Trial Court also ruled that it should decide what parenting time Dr. McLeod should have even though Dr. Clark had never proposed the severance of all contact between E.L.M.C. and Dr. McLeod. Dr. Clark merely proposed that she have sole decision making and that court supervised parenting time for Dr. McLeod end. The trial court found that Dr. McLeod had standing to petition for an award of parental responsibilities (i.e., decision making), even though Dr. McLeod had never filed a petition for parental responsibilities (i.e., decision making) and even though Dr. Clark had never been without the physical care and custody of her child, E.L.M.C.

Dr. Clark timely filed a Notice of Appeal with the Colorado Court of Appeals. The Colorado Court of Appeals erroneously upheld the 50/50 parenting time awarded by the

Trial Court, and erroneously upheld the joint decision-making. The Court of Appeals found that if a fit legal parent's exercise of parental responsibilities (i.e., decision making regarding a child's relationship with a "psychological parent") poses threatened emotional harm to the child, that threat alone establishes a "compelling state interest" sufficient to permit state interference with the parental rights of the child's fit legal parent. The Court of Appeals improperly held that a curtailment and later termination of the psychological parent's parental responsibilities (i.e., decision making, as opposed to parenting time) was sufficient to threaten emotional harm to the child thus warranting court interference with the right under the Fourteenth Amendment to the United States Constitution of the fit legal parent to direct the upbringing of her child. The Court of Appeals also vacated the restriction on the child not being exposed to anything that can be considered "homophobic" in the course of the child's religious upbringing, but remanded to the Trial Court for further findings of fact on whether or not such a restriction would be necessary to prevent emotional harm to the child.

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals decided questions of substance in a way that probably is not in accord with this Court's applicable decisions.

If a parent is fit enough to decide to involve a third party in her child's life, and she is found by a court to still be fit, then the parent is still fit to decide, without court interference, that the time her child spends with the third party should be reduced as long as the child's contact with the third party is not terminated. The parties cited to the Court of Appeals psychological and same-sex parent cases from across the country. In none of those cases has an appellate court of

record decided that the best interest of the child requires joint decision making between the psychological parent, or non-parent, and the legal parent. The most that the courts have decided is that the legal parent's cutting off of all contact with the psychological parent is a triggering event that requires the courts to intervene. Counsel argued to the Court of Appeals at oral argument that such a triggering event was required before the courts could find "special" circumstances requiring the courts to interfere with Dr. Clark's right to make decisions for her child.

By upholding the award of joint decision making, the Colorado Court of Appeals has in effect held that a child can have two legal mothers when it comes to decision making for the child. This position flies in the face of this Court's opinion in the case of *N.A.H. v. S.L.S.*, 9 P.3d 354, 359 (Colo. 2000). This Court there held that "although a child can certainly have emotional attachments to more than one father figure, she can have only one legal father." *Id.*, at 360. The determination of "legal" parent status is important because only the legal parent can make decisions for the child. *Id.*, at 359. By analogy, a child can have only one legal mother who makes the decisions for her, not two mothers as provided for by the Court of Appeals. The Court of Appeals erred when it held that the gender of the psychological parent was not relevant when deciding the issue of decision-making. *Opinion*, at 7-8.

The decision of the Colorado Court of Appeals in this case sets a dangerous precedent for all parents who involve a third party in their child's life. The Court of Appeals did not specifically adopt a test for who is a psychological parent, or establish a "bright line" test that sets forth when a psychological parent is created. Thus parents throughout the state, not just same sex couples, but also heterosexual parents

who allow others to help raise their child, are at risk of subsequently having that third party petition the courts in this state to determine whether or not the third party is a psychological parent. Under the Court of Appeals' decision, if the third party is a psychological parent, the legal parent then loses her Fourteenth Amendment right to alone decide what is in her child's best interests and would, in effect, forfeit her right to decide how her child is raised. Further, in the case of same sex couples, the couples are being treated as if they are married, even though public policy in Colorado, as set out in C.R.S. § 14-2-104, specifically limits marriage to one man and one woman. Thus the decision of the Colorado Court of Appeals adversely affects many, many single parents throughout the state, whether they are heterosexual or homosexual.

Further, neither in this Court's decision of *In re Custody of C.C.R.S.*, 892 P.2d 246 (Colo. 1995) nor in cases decided subsequent to *C.C.R.S.*, has an appellate court in this state taken away decision making from a fit legal parent who has always had daily physical custody and control of her child, and properly cared for her child, regardless of the level of contact the legal parent was allowing for the psychological parent. The legal parent subject to court deprivation of parenting time and/or decision-making has always before been unfit or has had little or no contact with his/her child. *People ex rel A.J.C.*, 88 P.3d 599, 600 (Colo. 2004) (biological mother in Missouri gave child up for adoption at birth and child lived in Colorado with prospective adoptive parents for more than six months); *In the Interest of R.W. and* T. W., 10 P.3d 1271, 1278 (Colo. 2000) (mother provided unsafe and unhealthy environment; children adjudged dependant and neglected); *In re Custody of C.C.R.S., supra,* at 249 (mother gave up child at birth and had only nominal contact with child); *In the Interest of K.M.B.*, 80 P.3d. 914, 915 (Colo.

App. 2003) (step-father has standing pursuant to C.R.S. § 14-10-123(1)(b) to petition for parental rights when child is not in the physical care of either parent for six months; child was in care of grandmother); *People ex rel A.M.K.*, 68 P.3d 563, 564 (Colo. App. 2003) (father had "little contact" with child after her first few months of life, but case remanded for trial court to accord father his *Troxel* presumption); *People ex rel A.R.D.*, 43 P.3d 632, 633 (Colo. App. 2001) (biological father was incarcerated based on a conviction of incest); *In re Custody of A.D.C.*, 969 P.2d 708, 709 (Colo. App. 1998) (mother voluntarily placed the child in the physical custody of grandparents for four months and resided elsewhere); *In re Matter of V.R.P.F. and S.R.P.*, 939 P.2d 512, 514 (Colo. App. 1997) (legal parent had only isolated contact with child). Thus, where the legal parent is fit and has always properly cared for her child on a daily basis, the most the courts have ever done is order parenting time for the psychological parent or non-parent, not decision making. After all, it is the preservation of the emotional attachment to the non-parent, preserved through a grant of parenting time, not decision making, that *N.A.H. v. S.L.S., supra,* acknowledges.

B. The Court of Appeals decided a question of substance in a way that probably is not in accordance with prior rulings of the United States Supreme Court regarding the Fourteenth Amendment rights of a fit legal parent.

By ruling that merely encouraging or allowing one's child to become emotionally bonded to a non-parent is a special circumstance such as to require the court to set aside the legal parent's Fourteenth Amendment right to make decisions for her child when the legal parent is properly caring for her child and allowing contact with the non-parent, the Court of Appeals decided this case and established a precedent which

is contrary to the law as set forth by the United States Supreme Court in the case of *Troxel v. Granville,* 530 U.S. 57 (2000). In effect, the Colorado Court of Appeals has said that any substantial reduction in decision-making by a non-parent automatically threatens emotional harm to the child, and this mere threat of emotional harm is sufficient to overcome the presumption under the Fourteenth Amendment that a fit legal parent acts in the best interest of her child. Of course, the Respondent was not awarded decision making for religion and dental care, thus effectively under-cutting the rationale of the Court of Appeals, and thus revealing that this is in fact a case of judges simply believing they can make a better decision than the child's sole, fit, legal parent. This is a dangerous precedent for all parents in Colorado that requires the intervention of the State's Supreme Court.

It is clear from a reading of the *Troxel* decision, that the United States Supreme Court places a very high premium on parental rights under the Fourteenth Amendment and that it is the legal parent, not a psychological parent or a third party who is emotionally involved in the child's life, that has those Fourteenth Amendment rights. The Court of Appeals in effect granted Fourteenth Amendment rights to a third party to raise someone else's child, with no factual basis at all for doing so, that are equal to the Fourteenth Amendment rights of a legal parent. This is the only rationale by which the Court of Appeals can require a non-parent and a parent to have joint decision making for a child. This is a dangerous precedent and adversely affects all families who seek the help of some third party to help in raising one's child. Merely involving a third party in the raising of one's child while one is always properly caring for one's child is not the kind of special factor that is necessary to overcome the *Troxel* presumption. The reduction in parenting time or decision-making must in fact pose the type of emotional or physical harm that will scar a

child for life. *See, Blixt v. Blixt,* 774 N.E.2d 1052, 1064 (Mass. 2002).

The Court of Appeals recognized that the trial court merely accorded "weight" to Dr. Clark's wishes. *Opinion,* at 41. This is simply what is required by statute in Colorado. The wishes of the legal parent were given the same weight as other factors in the statute, not special weight as required by *Troxel, supra,* at 69. This is a failure to accord proper weight to Dr. Clark's *Troxel* presumption and a clear violation of Dr. Clark's fundamental right to make decisions for her child. This is clear when one considers that Dr. McLeod testified that she did not know if Dr. Clark's plan would cause harm to E.L.M.C., and the record is devoid of any evidence that Dr. Clark's plan is not in the best interests of her daughter.

Further, the United States Supreme Court, like this Court did in *N.A.H. v. S.L.S., supra,* has held that a child can have only one legal mother. *See, Michael H. v. Gerald D.,* 491 U.S. 110, 118 (1989). The grant of decision making to Dr. Clark's former same-sex partner violates the holding in that case.

C. The decision of the Colorado Court of Appeals involves questions of substance not previously decided by the Colorado Supreme Court.

The Court of Appeals itself, at pages 11 and 30 of its decision, acknowledges that it is deciding important questions of constitutional law that have not been previously decided by any other division of the Colorado Court of Appeals or this Supreme Court since the United States Supreme Court's decision in *Troxel.*

C.R.S. § 14-10-123(1)(c) provides that a petition for parental responsibilities can be filed "by a person other than a parent who has had the physical care of a child for a period of six months or more ...." Use of the word "the" indicates that the physical care must be exclusive. The Court of Appeals cites the appropriate standard for determining legislative intent, but then erroneously required the legislature to use redundant language in the form of a "qualifier," before it would follow the plain English meaning of the word "the". *See, opinion*, page 19. Of course, the reverse logic is also appropriate. The legislature did not use a qualifier, such "the non-exclusive physical care," either. Use of the word "the" indicates that the physical care of the child must be exclusive, or at least to the exclusion of the fit legal parent. *Webster's New World College Dictionary*, 4th Ed., (Michael Agnes, ed., 1999), defines "the" as "referring to a particular person, thing or group... as that (one) being spoken of... that (one) which is present... as distinguished from all others..." The word "the" is exclusive of all others, particularly identifying its object.

The Court of Appeals ruled that merely sharing the care of a child with a fit legal parent who has always properly cared for her child is sufficient to give the third party standing to petition for parental responsibilities and obtain joint decision-making. The Court of Appeals acknowledges that no Colorado Appellate Court has addressed this issue since *Troxel*. The Court of Appeals has previously ruled that mere "isolated contact" between the legal parent and the child while the child is in the custody of a third party is not sufficient to defeat standing to bring a petition for parental responsibilities. *In re Matter of V.R.P.F. and S.R.P., supra,* at 514. The Court of Appeals has ruled that C.R.S. § 14-10-123(1)(b) provides standing while the child is in the physical custody of the non-parent and C.R.S. § 14-10-123(1)(c) provides

standing up to six months after the physical custody of the non-parent terminates. *In re Custody of A.D.C., supra,* at 709.

However, this Supreme Court has never ruled upon the issue of whether a party who is assisting the fit legal parent in caring for the child where the fit legal parent is daily properly caring for the child has standing to petition for parental responsibilities. Neither has this Supreme Court decided how much participation in "the physical care" of a child is necessary to bestow standing upon a third party.

It is not at all unusual for legal parents, particularly single parents, to request assistance with the raising of their child, but to not give up the daily physical care of their child exclusively to another person or persons. Simply involving someone in the life of your child and asking them to help care for your child does not meet the standard for a third party having "the physical care" of the child.

After this Court's decision in *C.C.R.S.*, the legislature amended C.R.S. § 14-10-123(1)(c) to change the words "physical custody" to "physical care". It is the Supreme Court, and not the Court of Appeals, which should determine whether involving a non-parent in the life of one's child amounts to giving that non-parent "the physical care" of the child so as to allow the non-parent to petition for parental responsibilities, including joint decision making.

CONCLUSION

Granting Certiorari in this case will resolve important issues on which existing Colorado appellant decisions provide little or no guidance. DATED this 11 day of August, 2004.

ROUSE & ASSOCIATES, P.C.

By: /s/ _____
James P. Rouse, No. 10675

Certificate of Service

The undersigned hereby certifies that he served a true and correct copy of the foregoing ***Petition for Writ of Certiorari*** by placing same in the United States Mail, first class postage prepaid, this 11 day of August, 2004 addressed to:

Gina B. Weitzenkorn
Mills & Weitzenkorn, P.C.
1441 18th Street, Suite 150
Denver, CO 80202

Denver Dist. Court Clerk
1437 Bannock Street, Room 256
Denver, CO 80202

and by Hand Delivery to:

Clerk of the Colorado Court of Appeals
2 East 14th Ave., 3rd Floor
Denver, CO 80203

/s/ _____

APPENDIX O

DISTRICT COURT, CITY & COUNTY OF DENVER, COLORADO
1437 Bannock Street, Room 256
Denver Colorado 80202

Case Number 96 DR 39
Courtroom 21

[Dated February 22, 2001]

In Re the Custody and Support of:	)
	)
E.L.M.C.,	)
minor child,	)
	)
And concerning	)
	)
CHERYL ANN CLARK AND ELSEY MAXWELL MCLEOD, Co-Petitioners.	)
	)

Attorney for Co-Petitioner Elsey Maxwell McLeod/Address:

Gina B. Weitzenkorn
MILLS & WEITZENKORN, P.C.
1441 Eighteenth Street, Suite 150
Denver, Colorado 80202

Phone Number: (303) 292-1441
FAX Number: (303) 292-1126

E-mail: gbw@mwlawpc.com
Atty. Reg. #: 7170

VERIFIED MOTION OF CO-PETITIONER ELSEY MAXWELL MCLEOD FOR ESTABLISHMENT OF PARENTING TIME SCHEDULE PURSUANT TO C.R.S. §1410-124

Co-Petitioner Elsey Maxwell McLeod, by her attorneys, Mills & Weitzenkorn, P.C. requests that the court make provisions for parenting time with each of the Co-Petitioners and the minor child E.L.M.C. pursuant to C.R.S. §14-10-124(1.5)(a) based upon the following:

1. The minor child, E.L.M.C. is six years old. She was born in China and placed in the physical custody of the Co-Petitioners on May 4, 1995.

2. On July 11, 1995, the Denver Juvenile Court approved the foreign adoption of E.L.M.C. by the Co-Petitioner, Cheryl Ann Clark.

3. Both of the Co-Petitioners have raised E.L.M.C. as their daughter since 1995.

4. The Co-Petitioner, Elsey Maxwell McLeod is a psychologist. The Co-Petitioner Cheryl Ann Clark is a psychiatrist.

5. E.L.M.C. considers each of the co-Petitioners to be her parent, she calls Dr. McLeod "Mommy" and she calls Dr. Clark "Mama."

6. Both of the Co-Petitioners have been equally involved in the day-to-day care of E.L.M.C.. They each take her and pick her up from school, take her to doctor's appointments, care for her when she is ill and parent her.

7. The Co-Petitioners have share the financial cost of raising E.L.M.C.. They share all major decisions of E.L.M.C.'s life.

8. On March 25, 1996, this court issued an Order Granting Joint Custody of E.L.M.C. to the Co-Petitioners. This order remains in full force and effect.

9. The Co-Petitioners have resided together for many years. Their relationship is ending and the Co-Petitioners have agreed that Dr. McLeod will move out of the residence jointly owned by them and obtain a new residence.

10. Therefore, a parenting time schedule for E.L.M.C. with each of her parents is needed.

11. The Co-Petitioners are both psychological parents of E.L.M.C.

12. Dr. McLeod requests that the court order that each of the Co-Petitioners be awarded equal time with E.L.M.C. as this is in her best interests. She requests that E.L.M.C. spend Monday and Tuesdays with Dr. Clark, Wednesdays and Thursdays with Dr. McLeod and that the co-Petitioners alternate weekends with E.L.M.C.

WHEREFORE, the Co-Petitioner, Elsey Maxwell McLeod, requests that the court enter a parenting time schedule for E.L.M.C. with equal time for each of the Co-Petitioners in this matter.

Dated: February 22, 2001

MILLS & WEITZENKORN, P.C.

By: /s/ _____
Gina B. Weitzenkorn (No. 7170)
Attorney for Co-Petitioner Elsey Maxwell McLeod
1441 Eighteenth Street, Suite 150
Denver, Colorado 80202
Telephone: (303) 292-1441

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

Elsey Maxwell McLeod upon her oath, states that she has read the foregoing **VERIFIED MOTION OF CO-PETITIONER ELSEY MAXWELL MCLEOD FOR ESTABLISHMENT OF PARENTING TIME SCHEDULE PURSUANT TO C.R.S. §14-10-124** and knows the contents to be true to her best knowledge and belief.

/s/ _____
Elsey Maxwell McLeod

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

The above and foregoing **VERIFIED MOTION OF CO-PETITIONER ELSEY MAXWELL MCLEOD FOR ESTABLISHMENT OF PARENTING TIME SCHEDULE PURSUANT TO C.R.S. §14-10-124** was subscribed and sworn to before me this day of February, 2001, by Elsey Maxwell McLeod.

/s/ _____
Notary Public

CERTIFICATE OF MAILING

I certify that on February 22, 2001 I served the **VERIFIED MOTION OF CO-PETITIONER ELSEY MAXWELL MCLEOD FOR ESTABLISHMENT OF PARENTING TIME SCHEDULE PURSUANT TO C.R.S. §14-10-124** on the parties herein by depositing a true and correct copy of same in the United States Mail, postage prepaid, addressed to:

Cheryl Ann Clark
3015 South Columbine St.
Denver, CO 80210

/s/ _____

APPENDIX P

DISTRICT COURT,
DENVER, COLORADO
Denver City and County Building
1437 Bannock Street, Room 256
Denver Colorado 80202
Telephone: (303) 640-2491

Case Number 96 DR 39
Courtroom 21

[Dated March 9, 2001]

In Re the Custody and Support of:	)
	)
E.L.M.C.,	)
minor child,	)
	)
And concerning	)
	)
CHERYL ANN CLARK AND ELSEY	)
MAXWELL MCLEOD, Co-Petitioners.	)
	)

Attorney or Party Without Attorney (Name and Address):
Barbara Salomon, Esq.
Jordan M. Fox, Esq.
Attorneys for Co-Petitioner CHERYL A. CLARK
CAGE & NORTH, P.C.
1433 17th Street
Denver, Colorado 80202

Phone Number: (303) 295-0202
FAX Number: (303) 296-7403
E-mail: bsalomon@cagenorth.com
E-mail: jfox@cagenorth.com
Atty. Reg. #: 8566 (Barbara Salomon)
Atty. Reg. #: 23971 (Jordan M. Fox)

VERIFIED RESPONSE TO VERIFIED MOTION OF CO-PETITIONER ELSEY MAXWELL MCLEOD FOR ESTABLISHMENT OF PARENTING TIME SCHEDULE PURSUANT TO C.R.S. §14-10-124

Co-Petitioner, Cheryl Ann Clark ("Clark"), by and through her attorneys Cage & North, P.C., submits the following response to Petitioner's *Verified Motion for Establishment of Parenting Time Schedule Pursuant to C.R.S. § 14-10-124.*

1. Clark admits the statements made in Paragraphs 1, 2, 3, 4, 5, 9, and 10 of Petitioner's Verified Petition.

2. In response to the statements made in Paragraph 6, Clark states that Co-Petitioners have both been extremely involved in parenting E.L.M.C., and have changed their work schedules over time to be available for her. Clark is generally more available during the school year and McLeod is generally more available during school vacations. Clark takes care of E.L.M.C.'s needs before school and takes her to school each day; the parties split taking care of E.L.M.C. after school. Clark is available as soon as E.L.M.C. is finished with school each school day; McLeod is available after 4 p.m. after work when she picks E.L.M.C. up from after school care on some days. Otherwise, Clark admits to McLeod's statements in Paragraph 6.

3. In response to the statements made in Paragraph 7, Clark states that though both parties have contributed to the financial care for the minor child, that such contribution has never been equal. Clark affirmatively states that, without offer of contribution by McLeod, she pays for medical and dental expenses, and funds a college account for E.L.M.C. Otherwise, Clark admits to McLeod's statements in Paragraph 7.

4. In response to the statements made in Paragraph 8, Clark states the custody order does not specify a parenting plan for the minor child should the parties separate. Clark further notes it is relevant to this proceeding that the parties did not seek to obtain a joint adoption for the minor child when such decrees were being granted at the time of Clark's adoption of the minor child. Otherwise, Clark admits to McLeod's statements in Paragraph 8.

5. In response to the statements made in Paragraph 11, Clark states she is the minor child's legal parent. Otherwise, Clark admits to McLeod's statements in Paragraph 11.

6. Clark does not respond to the statements made in Paragraph 12, which is McLeod's prayer for relief.

7. McLeod has agreed to move from the parties' home, but declines to do so until there is an agreed parenting schedule in place. Because the tension in the home is high and contrary to E.L.M.C.'s best interests, it is imperative that McLeod move forthwith and that an interim parenting schedule be determined as soon as possible thereafter.

8. Clark affirmatively states that as E.L.M.C.'s only legal parent, Clark's wishes for an interim and permanent

parenting time schedule should be given deference unless such schedule is demonstrated to be harmful to the child.

9. On an interim basis, Clark suggests that McLeod exercise the following parenting time:

a. Every other weekend from Thursday through Monday morning.

b. Wednesday evening time with the child on the off week.

10. Clark suggests that this schedule should be modified during the summer months when all three are traditionally more available due to Clark's usual reduction in her own work schedule for the summer and McLeod and the minor child are on summer school break.

11. Clark affirmatively states the parties' custody order should be supplemented as necessary now that the parties are no longer an in-tact family.

WHEREFORE Clark requests that McLeod vacate the parties' home at the earliest opportunity, and that temporary and final parenting orders and allocation of parenting time be set as appropriate to serve E.L.M.C.'s best interests.

Dated this 9th day of March 2001

By: /s/ _____
Barbara Salomon (No. 8566)
Jordan M. Fox (No. 23971)

Cheryl Ann Clark upon her oath states that she has read the foregoing **VERIFIED RESPONSE TO VERIFIED**

MOTION OF CO-PETITIONER ELSEY MAXWELL MCLEOD FOR ESTABLISHMENT OF PARENTING TIME SCHEDULE PURSUANT TO C.R.S. §14-10-124 and knows the contents to be true to her best knowledge and belief.

/s/ _____
Cheryl Ann Clark

STATE OF COLORADO)
)ss.
COUNTY OF DENVER)

The above and foregoing **VERIFIED RESPONSE TO VERIFIED MOTION OF CO-PETITIONER ELSEY MAXWELL MCLEOD FOR ESTABLISHMENT OF PARENTING TIME SCHEDULE PURSUANT TO C.R.S. §14-10-124** was subscribed and sworn to before me this 9th day of March 2001 by Cheryl Ann Clark.

/s/ _____
Notary Public
My Commission Expires 6/25/02

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing **VERIFIED RESPONSE TO VERIFIED MOTION OF CO-PETITIONER ELSEY MAXWELL MCLEOD FOR ESTABLISHMENT OF PARENTING TIME SCHEDULE PURSUANT TO C.R.S. §14-10-124** was duly served upon the following by depositing same in the U.S. Mail, postage prepaid, this 9th day of March 2001:

Gina B. Weitzenkorn (No. 7170)
Attorney for Co-Petitioner ELSEY MAXWELL MCLEOD
MILLS & WEITZENKORN, P.C.
1441 18th Street, Suite 150
Denver, Colorado 80202
Telephone: (303) 292-1441
Facsimile : (303) 292-1126
E-mail : gbw@mwlawpc.com

By: /s/ _____
Sarah J. Conley

APPENDIX Q

DISTRICT COURT,
CITY & COUNTY OF DENVER, COLORADO
Court Address: 1437 Bannock Street, Room 256
Denver Colorado 80202

Case Number 96 DR 39
Courtroom 21/15a

[Dated February 20, 2002]

In Re the Custody and Support of:	)
	)
E.L.M.C.,	)
minor child,	)
	)
And concerning	)
	)
CHERYL ANN CLARK and **ELSEY MAXWELL MCLEOD**, Co-Petitioners.	)

Attorney for Co-Petitioner Cheryl Ann Clark:

Name: James P. Rouse, Rouse & Associates, P.C.
Address: 7400 E. Orchard Road, Suite160,
Greenwood Village, CO 80111
Phone Number: 303-694-0694
FAX Number: 303-290-6530
E-mail: jimrouseatty@cs.com
Atty.Reg.#: 10675

AMENDMENT TO *"VERIFIED RESPONSE TO VERIFIED MOTION OF CO-PETITIONER ELSEY MAXWELL MCLEOD FOR ESTABLISHMENT OF PARENTING TIME SCHEDULE PURSUANT TO C.R.S. § 14-10-124"*

COMES NOW Cheryl A. Clark, by and through her attorneys, Rouse & Associates, P.C., and for her *Amendment to "Verified Response to Verified Motion of Co-Petitioner Elsey Maxwell McLeod for Establishment of Parenting Time Schedule Pursuant to C.R.S. § 14-10-124"* states as follows for the purpose of adding affirmative defenses.

AFFIRMATIVE DEFENSES

1. Dr. Clark is a fit parent and therefore pursuant to the holding of the United States Supreme Court in the case of *Troxel v. Granville,* 530 U.S. 57 (2000) the court must defer to the wishes of Dr. Clark regarding parenting time for the minor child inasmuch as Dr. Clark is presumed to be acting in the best interests of her child.

2. C.R.S. § 14-10-123, as written, violates Dr. Clark's substantive due process rights under the Fourteenth Amendment to the United States Constitution.

3. C.R.S. § 14-10-123, as applied, violates Dr. Clark's substantive due process rights under the Fourteenth Amendment to the United States Constitution.

4. C.R.S. § 14-10-123, as applied, violates Dr. Clark's rights under the Free Exercise Clause of the First Amendment to the United States Constitution.

5. C.R.S. § 14-10-123, as written, violates Dr. Clark's rights under the Free Exercise Clause of the First Amendment to the United States Constitution.

6. C.R.S. § 14-10-124(1.5)(a), as written, violates Dr. Clark's substantive due process rights under the Fourteenth Amendment to the United States Constitution.

7. C.R.S. § 14-10-124(1.5)(a), as applied, violates Dr. Clark's substantive due process rights under the Fourteenth Amendment to the United States Constitution.

8. C.R.S. § 14-10-124(1.5)(a), as applied, violates Dr. Clark's rights under the Free Exercise Clause of the First Amendment to the United States Constitution.

9. C.R.S. § 14-10-124(1.5)(a), as written, violates Dr. Clark's rights under the Free Exercise Clause of the First Amendment to the United States Constitution.

10. The court has no reason to interfere with Dr. Clark's substantive due process rights under the Fourteenth Amendment to the United States Constitution to direct the upbringing, education, discipline, and religious training of her minor child inasmuch as Dr. Clark is a fit parent.

11. Any rights that Dr. McLeod may have as a "psychological parent" to the minor child do not supercede Dr. Clark's constitutional rights as a fit parent for the minor child.

DATED this 20th day of February, 2002.

ROUSE & ASSOCIATES, P.C.

By /s/ _____
James P. Rouse

CERTIFICATE OF MAILING

The undersigned hereby certifies that on this 20th day of February, 2002, he served the foregoing *Amendment to "Verified Response to Verified Motion of Co-Petitioner Elsey Maxwell McLeod for Establishment of Parenting Time Schedule Pursuant to C.R.S. § 14-10-124"* by depositing a copy of the same in the United States Mail, first-class postage prepaid, addressed to:

Gina B. Weitzenkorn
Mills & Weitzenkorn, P.C.
1441 18th Street, Suite 150
Denver, CO 80202

/s/ _____
James P. Rouse

APPENDIX R

DISTRICT COURT,
CITY & COUNTY OF DENVER, COLORADO
1437 Bannock Street
Denver Colorado 80202

Case Number 96 DR 36
Courtroom 21

[Dated April 14, 2003 and
April 15, 2003]

In Re the Custody and Support of:	)
	)
E.L.M.C.,	)
a minor child	)
	)
and concerning:	)
	)
Co-Petitioners:	)
	)
CHERYL ANN CLARK and	)
ELSEY MAXWELL MCLEOD,	)
	)

TRANSCRIPT OF RECORDED PROCEEDINGS

The above-entitled matter was heard on Monday, April 14, 2003 and Tuesday, April 15, 2003 before the Honorable John W. Coughlin, Judge of the District Court.

Appearances:

Cheryl Ann Clark, Co-Petitioner
James Parker Rouse, Attorney
Amy Desai, Attorney

Elsey Maxwell McLeod, Co-Petitioner
Gina Weitzenkorn, Attorney

Michelle Roche, Special Advocate

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Mr. Rouse 8

Witnesses	Direct	Cross	Redirect	Recross
Dr. Elsey McLeod	11	41	90	106
Dr. Cheryl Clark	110	171		
Valrie Ann Burk	140	143		
Dr. Les Katz	144	192	214	219
Dr. Prenna (phonetic)	184	187	191	

Exhibits	Admitted
1	36
2	36
3	36
28	101
23	144
25	178

* * *

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... THE COURT: All right. Thank you very much.

MR. ROUSE: Your Honor, if I might. Just a word of explanation. We go into the triple letters on the exhibits and we didn't have tabs (inaudible). The first set is the single letters, the second set is the double letters, and the triple letters are actually labeled triple letters and the yellow tabs put on them –

THE COURT: That's fine.

MR. ROUSE: -- so everybody can follow what we did.

THE COURT: All right.

CROSS EXAMINATION

BY MR. ROUSE:

Q Now, Ms. McLeod, you were employed as a psychologist for Cherry Creek Public Schools, correct?

A Yes. It's Dr. McLeod, please. Thank you.

Q I'm sorry. I'm sorry.

A It's Dr. McLeod, please.

Q Okay. I'll try to remember that.

A Thank you.

Q Now, you work full time, do you not, during the school year?

A Yes. Yes.

Q What schools do you work at?

A I work at Cherry Hills Village Elementary and High Plains Elementary.

Q And High Plains?

A Um-hum.

Q And how far as those from Slavens?

A Cherry Hills Village is about five minutes and High Plains is, depending...

[p. 53]

... A Well that depends.

Q Would you look at Exhibit K, please. Will you tell us what Exhibit K is.

A It's an e-mail from myself to Cheryl on February 23, 2001.

Q I the third paragraph, last sentence, could you read that for the Court, please.

A "How could I build", that one?

Q "How could I build a relationship" yes.

A "-- with you when you are threatening to take E.L.M.C. away from me which means anything other than 50/50 and threatening legal recourse."

Q Now do you contend that E.L.M.C. would be harmed if Dr. Clark had her 55 percent of the time and you had her 45 percent of the time?

A I don't know the answer to that question.

Q What about 40 percent and 60 percent, Dr. Clark getting 60 percent and you getting 40 percent. Would that harm E.L.M.C.?

A I don't know. There's a lot of variables.

Q Down towards the bottom of the page on Exhibit K it says "without a parenting time agreement I will not move." Could you tell me what that's about?

A Well, I had repeatedly asked Cheryl for a parenting time agreement, some kind of legal document, and she basically said to trust her and that everything would be fine and she would certainly have E.L.M.C. be able to see me. And I said I'm sorry, I needed to have a legal document or I wouldn't be able to move out of the house because the way I understood it, it would be viewed as abandonment and I just needed us to agree on a parenting time and have a legal document before I could leave.

Q All right. So before you left, you and Dr. Clark were arguing frequently, were you not?...

[p. 79]

...class.

Q And is that your handwriting on that form?

A Yes.

Q So you filled out the form?

A Yes.

Q And that form doesn't say anything about Dr. Clark being another mother, does it.

A It's not called for or asked for.

Q So you didn't volunteer the information.

A No, not on that form.

Q Tell me what exhibit -- Well, you did expect Dr. Clark to always let everybody know that you are E.L.M.C.'s other mother, though, don't you?

A Certainly with physicians I do, yes, -

Q And churches and everything else under your plan, isn't it?

A -- school, churches, yes. Um-hum. Yes.

Q What is exhibit double Y, please.

A These are the questions that I formulated to send to our expert witness Dr. Katz.

Q Now did you write pages 2 through 7 of exhibit double Y?

A Let's see. Yes.

Q Do you -- You don't contend that Dr. Clark is not fit mother; do you?

A How do you mean that?

Q Well, do you think that she's a good parent to E.L.M.C.?

A I have -- I have concerns about her emotional stability at this point.

Q You didn't express those concerns before now, did you.

[p. 80]

A No.

Q On page 4 about halfway down just before the indented paragraphs, it says, "I feel my X," I assume that means Dr. Clark, "does not have the capacity to resolve issues, negotiate compromise, etc." Do you see that language?

A Yes.

Q Yet you insist on having nothing less than 50/50/parenting time, don't you.

A This was a letter to my expert witness from myself.

Q I understand that. You told me, "I feel my X," meaning Dr. Clark, correct?

A Correct.

Q "Dr. Clark does not have the capacity to resolve issues, negotiate compromise, etc." Do you see that?

A Yes.

Q And if you were-- you, yourself, have testified several times this morning that you will not accept anything less than 50/50 parenting, is that correct?

A I think 50/50 parenting would be a good plan.

Q And you have said before in this hearing, here today on several occasions, that you will not settle for anything less than 50/50 parenting, is that correct?

MS. WEITZENKORN: I'm going to object to the form of question. This is not a mediation to accept. The Court's going to issue its ruling and I -- This is -

THE COURT: That -- Her position is 50/50.

MS. WEITZENKORN: Yes.

Q (by Mr. Rouse) And you questioned Dr. Clark's fitness as a parent because she takes her child to this homophobic church, Mission Hills Church?

[p. 81]

A That's only one piece. I have broader concerns.

Q And you've never expressed those concerns before today.

A To whom?

Q Anyone.

A In the court?

Q Yeah, in the court, you never expressed that before today.

A No.

Q You certainly didn't have any problem last summer with Dr. Clark spending 50 percent of the time with E.L.M.C., did you?

A No.

Q You didn't have any problem before you separated with -- separated from Dr. Clark with Dr. Clark helping to raise E.L.M.C. at that time, did you.

A Before we separated?

Q Right.

A No. This is some time later, I might add.

Q Now on page 6.

THE COURT: Excuse me. It's 12:15, let's break now and I'll see you at 1:30. The court is in recess.

(Recess taken.)

THE COURT: Please be seated.

We're going to call now who?

MS. WEITZENKORN: Your Honor, I'm expecting Dr. Katz, but he's not hear [sic] yet, so can we continue with Dr. McLeod?

THE COURT: I thought we were doing a phone conference, right?

(Inaudible.)

[p. 82]

You may proceed, sir.

Q (by Mr. Rouse) Dr. McLeod, could you turn back to Exhibit YY, please.

A Okay.

Q Now, is it your contention that prior to separating from Dr. Clark that you divided the time parenting E.L.M.C. equally?

A Fairly, yes.

Q And you have, in fact, for Dr. Katz, have you not, described that division of time as a pathological dividing of time, haven't you?

A Yes.

Q Would you look at exhibit double Z, please.

A Okay.

Q Can you tell me what that is.

A This is a -- an e-mail that I sent to Dr. Katz on apparently March 10, 2003.

Q In that e-mail didn't you tell Dr. Katz that you really are not co-parenting with Dr. Clark?

A Where are you referring to.

Q Second page, at -- towards the end of the letter there, the third-to-the-bottom paragraph it says, "I could possibly see it if Cheryl and I were friends and really co-parenting."

A I meant friendly co-parenting.

Q So you're not engaged in friendly co-parenting.

A We're not friends.

Q And you're not really co-parenting or you're not really friendly co-parenting, or what.

A I think we're attempting as best we can to cooperate in a co-parenting...

[p. 110]

...Good afternoon.

Do you solemnly swear under the pain of perjury the testimony you are about to give shall be the truth and nothing but the truth? Thanks.

DIRECT EXAMINATION

BY MR. ROUSE:

Q Would you please state your name for the record.

A Cheryl Clark.

Q And what is your address?

A 2778 South Steele, Denver.

Q What is your occupation?

A I'm a psychiatrist.

Q Are you any relationship to E.L.M.C.?

A I'm her adopted mother.

Q And do you know Ms. McLeod, seated at counsel table?

A Yes, I do.

Q How did you first meet Ms. McLeod?

A We met when we worked together at Fort Logan Mental Health Center in 1998, I think.

Q And did the two of you ever have occasion to discuss bringing children into your lives?

MS. WEITZENKORN: Your Honor, we've discussed this all at the last hearing.

THE COURT: I'll let you go into it a little bit.

A We did talk about it.

Q (by Mr. Rouse) When was that?

[p. 111]

A The first time was 1992.

Q And what did you discuss about having children at that time?

A At that time Dr. McLeod stated that she wanted to explore artificial insemination because she wanted to get pregnant.

Q And did she in fact try artificial insemination?

A No, she did not.

Q Other than artificial insemination, did you have any discussions regarding bringing children into your lives?

A Well, in 1994, -- Well, let me back up just a second. After Dr. McLeod decided not to do artificial insemination, she told me that she didn't want to have children, and that she would prefer that we travel and not have children in our lives. And then in 1994 I really felt like I wanted to have a child and my preference was an adoption, and so there was a wonderful article in the Denver Post sometime in August of 1994 that showed a picture of one of the first early groups of children coming back from China, and I had heard from somebody else about adoption from China and a little bit about the process, and I approached her and let her know that I really wanted to pursue adopting a child from China.

Q What was Ms. McLeod's reaction to that?

A At first she was ambivalent about the idea in general because she had already decided that she did not want to have children, and I was certainly somewhat concerned that it would be the end of our relationship because of how she felt, but I told her that I would be pursuing the adoption anyway, one way or the other.

Q And did you pursue the adoption?

A Yes, I did. I called the adoption agency that day just to get a little bit more information about the process. I was completely unfamiliar with international adoption at [p. 112] that point, and they said, well, I think the next week there was an information night that I could come to and they would be giving a lot more information about the whole process of adoption. It was fairly new for China to be open for international adoption to the United States, so they wanted to make sure that everybody understood the process.

Q And did you, in fact, go to the meeting?

A Yes, I did. It was the end of August of 1994.

Q Did you in any way limit Dr. McLeod's participation in the adoption of your child?

A Yes and no. She was very clear that she did not want to have children. She was very ambivalent about me adopting someone -- adopting a child. She was also very clear that she didn't want to participate in the adoption and some of that dated back to what had happened around 1992 and her interest in artificial insemination.

Q Did you, in fact, go to China to adopt E.L.M.C.?

A Yes.

Q And did Ms. McLeod go with you?

A Yes.

Q And how did you represent your relationship with Ms. McLeod to the Chinese officials?

MS. WEITZENKORN: Your Honor, I'm going to ask -

THE COURT: We've gone through this. I don't need to hear things twice. I'm not the smartest person in the world, and I really don't need to hear things twice.

MS. WEITZENKORN: Your Honor, I also would ask that he please -It's Dr. -- It's not Dr. Clark and Ms. McLeod. They're both doctors, and I think Mr. Rouse can get that straight.

[p. 113]

THE COURT: I understand.

Q (by Mr. Rouse) Did you ever discuss with Dr. McLeod her pursuing her own adoption of the child?

A It came up two or three times during the several months preceding the adoption of E.L.M.C. and then at least once or twice after, and at that point she was thinking that perhaps she would start her own adoption. She didn't, though. She decided not to.

Q And was the adoption formalized in Colorado?

A Yes.

Q Would you please look at exhibit triple C in the white notebook.

A Okay.

Q What is exhibit triple C?

A Is it all these pages? Okay. The first page is a receipt from CCAI which was the adoption agency. It stands for Chinese Children Adoption International.

Q In general, what are the documents?

A Oh, these are all the adoption documents that had to be processed prior to going to going to China and then in China as well as E.L.M.C.'s naturalization certificate, the validation of an adoption in juvenile court.

Q Does Ms. McLeod's name appear anywhere in the adoption paperwork that is exhibit triple C?

A No, it does not.

Q After you brought E.L.M.C. home, how long after that did you have the adoption formalized in Colorado?

A I think that was June or July. It seems like it was July 11th of '95, but I'll know in just a second as soon as I find it.

THE COURT: (Inaudible) Juvenile court July 11, 1995. Does that help?

[p. 114]

A That's it. I Can't find it, but -

Q (by Mr. Rouse) That would be within a couple of months after E.L.M.C. arrived in the United States. Is that correct?

A Yes.

Q After E.L.M.C. was brought to your house, what amount of parenting time did you allow Ms. McLeod to spend with E.L.M.C. while the three of you lived together?

A It would be hard to say exactly.

MS. WEITZENKORN: Sir, I would object again. I think this has been gone through with the magistrate, gone through with the Court, and we're just revisiting something that Dr. Clark does not like the response two times an hour and a third time.

THE COURT: I'll allow the question. It does concern me, though, that there might be an estoppel argument when she files a petition for co-parenting she's changing her position, obviously, I don't know, seems like we'll look at that as being estoppel. I'll allow the question.

Q (by Mr. Rouse) Do you know approximately what division of parenting time Dr. McLeod had when she was living with you?

A I can't think of a way to quantify it, but when Dr. McLeod went back to work she went back -- She's testified before that she went back to work three days a week, worked those three and a half days and I don't really recall how that worked out on a weekly basis. But she was working 24, 25 hours per week. I went back to work 20 hours a week, and then Heather was the nanny. We paid her for 20 hours a week, but she worked about 10 or 15 actually. I mean, the best that I can say is that, you know, Dr. McLeod was working more than I was, and I was home more, and I think I was home that first year two days a week and then I worked part of the other three days out of the week and then, of course, home on the weekends.

[p. 115]

Q Would you describe the division of parenting time as an exact 50/50 division of parenting time?

A No, I wouldn't.

Q While the three of you were living together, did you allow Ms. McLeod to make any medical decisions?

A You know, I always listen to her input, but the final decision was mine.

Q While the three of you were living together did you allow Dr. McLeod to make any medical decisions regarding E.L.M.C.'s extracurricular activities?

A Not that I recall. I recall anything like that requiring a signature I always signed them.

Q While the three of you were living together, who signed the permission slips for E.L.M.C.'s extracurricular activities?

A As I recall it, I signed them.

Q Well, while the three of you were living together, who signed the registration forms for E.L.M.C.'s extracurricular activities?

A I did.

Q While the three of you were living -- lived together, how did you handle getting E.L.M.C. to school?

A I took her to school every day. Dr. McLeod went to work much earlier than I did, and so I took E.L.M.C. to school, I think five days a week. I don't know that I recall any day that she ever took her.

Q When you adopted E.L.M.C., did you adjust your work schedule any more than it had been?

A Yes. I cut down -- I've never worked full time, I always worked about 25 or 30 hours per week in my private

practice, and I cut back to 20 hours a week, and I [p.116] continued to do that for quite some time.

Q Why did you adjust your work schedule?

A So I could be home with E.L.M.C. as much as possible.

Q Did that result in less income to you?

A Oh, yeah, definitely.

Q While E.L.M.C. was an infant, how were feeding, bathing and bedtime -- those types of usual chores handled?

A You know, some of them we did together, and -- but primarily, again, I was home quite a bit more than Dr. McLeod was, and so primarily I was doing that unless Heather was there.

Q While the three or you were living together, did Dr. McLeod ever insist on E.L.M.C. being placed in after-school care so that she could be involved with E.L.M.C.?

A When E.L.M.C. started kindergarten at Slavens I was working just during the work -- school hours, and so I was there in the morning and in the afternoon, but Dr. McLeod wanted to have some days where she would pick E.L.M.C. up from school, but she didn't get off in time so she did ask to have E.L.M.C. put in some daycare. I thought it was unnecessary, but to avoid conflict, basically, I let her do that.

Q Did there come a point in your relationship with Ms. McLeod where the relationship deteriorated?

A Almost immediately upon adopting E.L.M.C.

Q What sorts of problems resulted when E.L.M.C. was adopted?

A Well, I mean, from my perspective, part of what was going on was that Dr. McLeod had a lot of remorse about not having her own child earlier in life, and was in conflict herself about whether or not to adopt a child. And so that came up again after E.L.M.C. came back from China that she was going back and forth about whether she [p.117] should start an adoption or not and -- I mean, ultimately, again, she decided not to have a child and it seemed like what happened after that was a lot of competition for E.L.M.C.'s attention, and I mean, things got certainly very bad over the course of the year as we didn't have any really intimate contact with each other since 1995. And that became a real source of conflict (inaudible).

Q Was Ms. McLeod ever critical of your parenting decisions in front of E.L.M.C.?

A Yes.

Q Would you give me some examples.

A Most of them were -- For the most part they were so small, at times I really struggled with why is this even coming up, because they seemed like such petty things to be critical about. But one specific example that I remember -- because it was so painful -- was I always got E.L.M.C. up and got her ready for school and made breakfast for her and made her lunch. And she was going through a period of time where she was having problems with constipation and so I was trying to increase the fiber in her diet, and that morning I was fixing

her some eggs and toast and Dr. McLeod walked through the kitchen on her way out the garage door and she said, well, aren't you going to give her any fiber for breakfast, you know, in a really hostile tone. And E.L.M.C. was standing right there. And I said, well, yes, you know, that's in the bowl right here, but she also wanted some eggs this morning, so I was fixing that -- It was that kind of thing, just small things, very nitpicky, very hurtful to me, but what disturbed me more was that it was happening in from of E.L.M.C., which I thought was really not appropriate. I mean, if she had concerns I urged her to bring this up with me outside of E.L.M.C.'s earshot.

Q Did you have any disputes with Ms. McLeod over giving gifts or presents?

A Yes. She bought a lot of presents for E.L.M.C.

[p.118]

THE COURT: We talked about that before. Next question.

Q (by Mr. Rouse) Did you have any disputes with Dr. McLeod over her interfering in your relationship with E.L.M.C.?

A Many.

MS. WEITZENKORN: Your Honor. I believe this was --

THE COURT: This was gone over before.

MS. WEITZENKORN: Yes.

Q (by Mr. Rouse) Would you please look at Exhibit A in the large notebook.

A Okay.

Q Do you know what Exhibit A is?

A E.L.M.C.'s medical records.

Q Who took E.L.M.C. to the doctor's office while the three of you were living together?

A Well, I took her to all her well child visits and most of her visits when she was sick. Sometimes Dr. McLeod would take her if I really had to work and I couldn't take the time off. If she had the availability, she would take her.

Q Would you please look at Exhibit B.

A Okay.

Q Could you tell me what Exhibit B is, please.

A It looks like E.L.M.C.'s dental records.

Q And did you fill out the first page of Exhibit B?

A Excuse me. Yes I did.

Q And who took E.L.M.C. to the dentist?

A Well again, I took her to -- Mostly, until this year, she had well child visits only, and, I mean, I recall taking her to those. There were not very many of them. [p. 119] She went a couple of times a year to have her teeth cleaned.

Q What is Exhibit C, please.

A These are E.L.M.C.'s orthodontic -- orthodontic records.

Q And who initially took E.L.M.C. to the orthodontist?

A I took her.

Q Would you please look at Exhibit D. Could you tell me what Exhibit D is?

A It looks like the medical information sheets for E.L.M.C.'s dermatologist, Dr. Terrio.

Q And what is the second page of Exhibit D?

A Insurance authorization and assignment.

Q Did you fill out the second page of Exhibit D?

A Yes, I did.

Q Whose handwriting is on page 3 of Exhibit D?

A That's Dr. McLeod's handwriting.

Q Were you present when she filled out that form?

A You know, they're dated the same date, but I don't recall seeing her fill this out, so I'm not sure when she filled it out.

Q After you adopted E.L.M.C., did you bring a legal proceeding to change E.L.M.C.'s legal name?

A Yes.

Q And why did you do that?

A Dr. McLeod was emotionally supportive to me during the adoption process and I wanted to acknowledge that, and so her name was added as a middle name for E.L.M.C.

[p. 120]

Q Who paid for the name change?

A I think I did.

Q What is Exhibit F?

A Oh, this is the front cover of E.L.M.C.'s Thursday folder from first grade.

Q Do you recognize the writing that says McLeod on Exhibit F?

A It's Dr. McLeod's handwriting.

Q What is Exhibit H, please.

A Denver Public Schools Health and Emergency form.

Q Were you the one that had to fill that form out?

A Yes, I filled it out.

Q Do you recall when the current 50/50 co-parenting was put into effect?

A This week-on and week-off schedule, or just–

Q The initial 50/50 parenting, three-day, three-day.

A Okay. April 3, 2001.

Q Did you reflect -- Does that reflect the reality of what was being done with the parenting of E.L.M.C. prior to imposition of the magistrate's order?

A No, it doesn't. Again, I was working part time. Dr. McLeod was working full time.

Q Do you recall agreeing to the magistrate's 50/50 co-parenting order?

A I did not agree with it.

Q Prior to the court-imposed 50/50 co-parenting, how was E.L.M.C. doing in school?

A She was doing well. She's always done well in school. She likes school quite a bit.

Q Prior to the court-imposed 50/50 co-parenting, how was E.L.M.C. doing [p. 121] emotionally?

A She was doing well.

Q Prior to the court-imposed 50/50 co-parenting, how was E.L.M.C. doing health-wise?

A You know, other than these dermatologic problems, her health has been quite good.

Q When E.L.M.C. has parenting time with you, does she ever talk about what she does with Ms. McLeod when she's with Ms. McLeod?

A Sometimes. She mostly talks about her pets. She really likes having pets and she'll talk about her pets. She may talk about who she sees, who they get together with socially at different events, that kind of thing.

Q How do you react when E.L.M.C. tells you about what she does when she's with Ms. McLeod?

A Oh, I always encourage her to have a good time and to enjoy what she's doing when she's there.

Q As the relationship between Dr. McLeod and you deteriorated, how did the two of you communicate?

A It's mostly been through correspondence, written correspondence.

Q Why is that?

A Well, at first Dr. McLeod was sending me quite a few e-mails, but several of them felt to me to be very abusive, and so I changed my e-mail address so that I wouldn't receive any more. And then she started sending letters and those escalated over time again being abuse -- emotionally abusive -- accusing me of all kinds of things. And so then we had a mediation session in January over the phone where, again, she started arguing with me over the phone with the mediator, accused me of several things and after...

[p. 134]

...added our last trip to Knoxville to it, but I didn't know she had an account.

Q So you didn't sign her up for the Delta Sky Miles Club?

A No, I didn't.

Q Do you have a plan for parenting E.L.M.C. that you think is in E.L.M.C.'s best interests?

A Yes, I do, the one that we submitted to the Court.

Q Would you please look at exhibit double G. you know what exhibit double G is?

A Yes, this is my proposed parenting plan.

Q And who actually devised and wrote up this plan?

A I did.

Q Can you briefly summarize the plan for the Court?

A Well, I did quite a bit of research before writing this plan for the Court because I wanted to make sure it was consistent with what experts in the field have written about children of E.L.M.C.'s age. She's only 8.

And especially in a high conflict situation like this, what I pulled together from the books that I read that many of them are well known books that lots of people read around developing parenting plan including Sandcastles and the Barriss and Garrety book on Caught in the Middle -- Children in the Middle of High Conflict Divorce. But I also looked at

the parenting plan guidelines that have been adopted by several courts around the country, specifically Indiana Supreme Court has a set of guidelines that they use. Michigan has a set of guidelines that they use and also Arizona. And they're age-specific for children of E.L.M.C.'s age, and all of those references -- First of all, they don't recommend a 50/50 plan for children even in a low conflict situation of E.L.M.C.'s age. But certainly not in a high conflict situation. Most of those -- All of those plans had a fairly [p. 135] standard every-other-weekend parenting plan with the child remaining in one residence primarily during the week and with a mid-week visit. So that's -- That was sort of the background, the template at developing this plan..

But also I think as we mentioned to the Court in our trial brief, this plan is also based on a similar plan in a Colorado Court of Appeals case, I forget the name of it.

Anyway, so essentially this plan sets out for E.L.M.C. a slowly decreasing level of court ordered time which is not the same as that she would not see Dr. McLeod at all, it just means that the Court order in the case would eventually go away in two years, not in one year as Dr. McLeod has testified, it's actually 2005. In the summer would be sort of a transition period for E.L.M.C. to get accustomed to the new schedule that would be starting around the time that school would start, and it also has an equitable division of the holidays which reflects much of what Dr. McLeod and I had talked about in one way or another in mediation. It also sets out a way for managing the summer holidays and how to -- summer schedule, and how to get that done without all the conflict we've had every single year up to this time.

Q Do you feel that your plan is in E.L.M.C.'s best interests?

A Yes, I do.

Q And why is that?

A Well, I think it provides substantial time for Dr. McLeod, but it also gives E.L.M.C. stability, and it decreases the areas where we can have conflict.

Q Have you had occasion to review Dr. McLeod's proposed parenting plan which is Exhibit 27?

A Yes, I have reviewed that.

Q Were you consulted in the drafting of that plan?

A No, I was not.

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Q So when it says "the parties have agreed," that's not accurate?

A No, it's not. I mean a few of these issues we've touched on in mediation, but they were not agreed to, and -- and unlike Dr. McLeod, I haven't reneged on anything. There are still some open issues in mediation that have not been resolved yet, there are some areas where we're still batting back and forth different ideas.

Q Do you have an opinion on the merits of Dr. McLeod's plan?

A Well, I don't think that it's in E.L.M.C.'s best interest. First of all -

Q Why is that?

A Well, first of all, the way that it's written -- it seems to be more about what Dr. McLeod wants rather than what might be good for E.L.M.C. For example, the joint decision-making areas. You know, the reality is that until the temporary orders went into place I made the final decisions for E.L.M.C. in all of these areas. Dr. McLeod would give me input, but the final decision was mine, even when the joint custody decree was in place our understanding was that that only went into effect if I was somehow incapacitated or I was dead, and the final decision for E.L.M.C.'s activities, her medical care, her education, those final decisions were all left to me. We would discuss them. She would give me her input. Sometimes I agreed with it, sometimes I didn't. But the ultimate decision was mine. The joint custody decree was declared void by the Court for lack of subject matter jurisdiction, I think, was the ruling by Magistrate Dupree and it ordered that we would have shared few major issues, but only a few major issues. And those have been -- I mean, we tend to disagree about those significantly.

MS. WEITZENKORN: I'd just like to let the Court know that Dr. Katz is here.

THE COURT: Well, you have your teacher coming in at 4, too, don't [p. 137] you? Well, I'm going to go to 3:30, then I'll take a 15 minute break and then you're going to have to decide which one of these people you want to put on.

MS. WEITZENKORN: Thank you. Okay. Fine.

Q (by Mr. Rouse) Do you feel that the provisions in Dr. McLeod's plan for mediation of disputes are helpful to your efforts to raise E.L.M.C.?

A Well, I think her plan leaves too many areas where we have to coordinate around issues that we already both know that we disagree on. And they create just more opportunities for us to have conflict, and I don't think that's good for E.L.M.C. I certainly don't think it's good for either one of us to continue in that kind of conflict.

You know, I think there are some things that certainly mediation can help with, but I don't think that Ms. McWilliams is the right mediator for this situation. Primarily because I don't feel safe there. It feels like she has allowed some things to go on that she really should have stopped, and in this situation I'm the client and Dr. McLeod is a client, and it seems like it's incumbent upon her to create a safe environment, and I don't think that she does. And I've had to insist on separate mediation conference rooms so that I can feel safe being there. Well, that's not a very good way for me to mediate these really high conflict situations.

Q Any other comments you have on Dr. McLeod's proposed plan?

A Well, we already know that we disagree on the area of religion, and I assume we'll have time to get into that in a little more depth at some other point, but, I mean, that's clearly a very big issue if she thinks that what E.L.M.C. is learning in a second grade Sunday school class is homophobic, then she's completely out of touch with reality on that issue and it's certainly not what's going on in E.L.M.C.'s Sunday class. I've assisted in that Sunday school class. E.L.M.C. and I talk about it. They do cute little things about Bible stories and little art projects, and I've been assured by the ministers at the church [p. 138] that they don't teach anything about homosexuality.

Q Prior to today, did you ever see this pamphlet that's Exhibit 28?

A No, I've never seen this before.

Q Do you have any reason to believe that E.L.M.C. had ever seen that pamphlet?

A I'm sure E.L.M.C.'s never seen it. And I'm not even sure it's from my church. I mean it doesn't even have my church's name on it anyplace.

Q Did you–

A I mean they have pamphlets about Harry Potter, as well, but E.L.M.C. loves Harry Potter. She sees Harry Potter movies and reads books about Harry Potter. I don't know where this came from. If Z says she got it at the church, maybe she did, maybe she didn't. I just don't know. It doesn't have the church's name on it, so I don't know where she picked it up.

Q Do you recall the order by Judge Coughlin last summer to make sure she wasn't hearing anti-homosexual or homophobic things at church, correct?

A Oh, absolutely, yes.

Q And have you complied with that order?

A Absolutely.

Q How did you go about complying with that order?

A I checked it out with the ministers at the church to find out if there was anything that I should be concerned about that E.L.M.C. would be hearing there. They said -- They assured me that there was nothing anti-homosexual being taught at the church and, you know, frankly, the place where E.L.M.C. has heard things that might be construed to be homosexual -- anti-homosexual is at school. She's in a public school. There have been a couple of occasions where a couple of boys in the class have come up...

[p. 144]

... THE COURT: Dr. Katz, you're going to scare me with all this (inaudible).

Do you solemnly swear under the pain of perjury the testimony you are about to give shall be the truth and nothing but the truth?

DR. KATZ: I do.

THE COURT: Thank you.

DIRECT EXAMINATION

BY MS. WEITZENKORN:

Q Dr. Katz, would you please state your full name and business address for the record.

A Dr. Les Katz, 1191 South Parker Road, Denver, Colorado.

Q And Dr. Katz, what is your profession?

A I'm a psychologist.

Q And I'd like you to look in the small brown book at Exhibit 23.

A Yes.

Q And can you identify that document?

A This is my CV.

Q And does this CV list your professional experience, education, as well as a list of cases that you testified in and continuing education workshops, and publications?

A Yes, it does.

Q I move for the admission of Exhibit 23.

MR. ROUSE: I think they're already admitted, Your Honor.

THE COURT: 23 is admitted.

Q Dr. Katz, are you in private practice as a psychologist?

A Yes, I am.

[p. 145]

Q And what is the nature of your practice?

A At this point it's almost exclusively doing work in family dissolution cases either as a special advocate, a

parental responsibility evaluator, occasionally a parent coordinator or mediator, and then doing some kinds of consultation and expert testimony for-- with attorneys.

Q And how long have you been doing work in the family dissolution arena?

A Well, since I started my practice which was in like about 1982, so for a little over 20 years for probably two-thirds of that time it was half psychotherapy and half of this kind of work, and in the last couple of years I've moved more and more towards doing this work almost exclusively.

Q And according to your CV, you're a licensed clinical psychologist in Colorado since 19 -- excuse me, 1984?

A That' s correct.

Q Now, your CV lists the number of cases where you've testified as witness. Is that a complete list of every case where you've been a special advocate or done an evaluation?

A No. The testimony list is about the last five years and I may have missed one or two here or there. But then there are many cases that settle or that my testimony isn't needed, and those are many more cases than the ones I testify in.

Q And do you know approximately how many custody or allocation of parental responsibility or parenting time evaluations you've completed?

A At least 500, probably more than that.

Q And have those all been in Colorado?

A Yes.

Q Does that also include the cases where you've been a special advocate?

[p. 146]

A Yes.

Q Now, do you also serve on any committees through the courts or the psychological association relevant to your work?

A Well, I serve on a number of committees. I'm on the Colorado Psychological Association's Ethics Committee, and so when cases come in that have to do with this kind of work I'm usually involved in that kind of thing on the ethical side of it. I've been involved in the Metropolitan Denver Inner Disciplinary Committee and a lot of work with professional kinds of issues, so I co-chaired a committee that developed guidelines for special advocates, and I chaired two different committees that developed guidelines for custody evaluators. Currently I am on the family issues committee of the Colorado Supreme Court and that's a committee that's implementing some changes in the family court system.

Q Now, you've submitted a report concerning the case -- the Clark and McLeod case, is that correct?

A That's correct.

Q And that report is Exhibit 22 and was submitted to the Court, is that correct?

A That's correct.

Q Now, you were retained by Dr. McLeod, is that correct?

A Yes.

Q And were you retained to make recommendations to the Court concerning the allocation of parental responsibility and parenting time with E.L.M.C.?

A Well, I wasn't, but even if I had been I wouldn't have done it, because –

Q And why is that?...

[p. 150]

...there's an amount of conflict that persists for a period of time when people are unresolved about things. You know, what you see is a very, very -- in very severe cases, a total inability to communicate about anything -- volatile situations that can blow up very quickly, people that really shouldn't be in the same room together, or even exchange kids directly.

And then you get, like I said, along the continuum you get all sorts of kinds of conflict. Most divorce, as I indicated, has some level of conflict involved in it.

Q I want to backtrack a minute. Have you been determined to be an expert ever by courts in Denver or in the state of Colorado?

A Yes.

Q And the cases where you testified that were listed on your CV were you fount to be an expert in those cases?

A Yes.

Q Were you found to be an expert in -- specifically what area?

A Well, usually it will be things like doing custody evaluations, being a special advocate, having expertise in family dynamics, child development, parent-child relationships, parenting time plans, parenting responsibility, sometimes depending on the situation that I've testified in, ethical issues, sometimes, you know, couple dynamics, family structure, family systems, and I think that would pretty much cover the areas.

MS. WEITZENKORN: Your Honor, I would offer Dr. Katz as an expert in family dynamics, child development, parent-child relationships, and expertise in children's issues and families going through dissolution.

THE COURT: Any objection or voir dire, sir?

MR. ROUSE: Voir dire, Your Honor.

VOIR DIRE

[p. 151]

BY MR. ROUSE:

Q Dr. Katz, do you consider yourself to be an expert on situations where there are homosexual couples involved?

A What kind of situations?

Q Have you ever testified in cases involving the breakup of homosexual couples?

A I don't think I've had a case where I've actually testified in that situation.

Q Have you evaluated, or been asked by a court to evaluate, situations where a homosexual couple is breaking up.

A On occasion I've had that. It's not, you know, a primary part of what I've done. I've had occasion to do that on a couple of times during my career, but not as a regular basis.

Q Have you had a-- an occasion to deal with a situation where there was a lesbian couple and one changed their sexual orientation and then they broke up?

A No.

Q Isn't it true that you would have to extrapolate heterosexual divorce cases in order to give your opinion today?

A I don't know what opinions I'm going to be asked to give. There may be some areas where if I'm asked certain questions and that's part of the issue -- As I always say, attachment is attachment, and relationships are relationships, and I've kind of found that to be the case across the board of the kinds of families I've worked with, but I don't claim to be an expert regarding the very narrowly defined things that you've just asked.

Q All right, so you're an expert on child dynamics?

A Child development.

[p. 152]

Q Child development. And what exactly does that mean?

A Well, you know, the issues in divorce and a lot of the literature is about the effect of divorce on children at various ages. And so child development becomes a major issue in the kind of work we do.

Q All right. What else are you an expert on?

A I just –

Q Parenting plans –

A Well, you want me to go through the whole list of things I just said again, or --

Q Yeah, if you would please.

A Well, I said that I've been qualified to be an expert in various courts at various times on that kind of list of things that I listed. One was parental responsibility, decision-making issues, parenting time, parenting plans -- the development of them. I've been qualified as an expert regarding family dynamics, parent-child relationships, the effects of divorce on children at various ages, and whatever else I listed, it's kind of escaping me right now. I've been qualified at various times on some ethical issues. I've been qualified on dealing with procedures involved in doing this kind of work because I've critiqued other people's work. So those would be the kind of areas that I've been qualified.

MR. ROUSE: Your Honor, since he has no expertise on the breakup of a lesbian couple, I would object to his testimony.

THE COURT: He will be accepted as an expert as offered. It's my understanding -- correct me if I'm wrong -- You're not claiming to be an expert in the breakup of lesbian relationships.

DR. KATZ: No....

[p. 159]

... frequent, liberal kinds of plans, and when people didn't get along with each other -- They worked when people got along with each other, but when they didn't, they were left with nothing except for a lot of disputes and so it becomes really important, I think, to have a defined plan over time that people can revert to. And then if they start to get along with each other, great. They can modify their plan, they can work together in a different kind of way, but, you know, one thing that's never guaranteed is what's the future of conflict. You never know what's going to happen. And that's why we want something to revert back to.

Q Dr. Clark testified that she looked at the experience in Indiana and Michigan and perhaps in other states and found that her research showed that 50/50 parenting time plans for children at eight years old was not the standard or appropriate. Did you hear that testimony?

A I did. I couldn't hear very well, but I heard most of that part.

Q And what has been your experience in Colorado and in reviewing the research that-- also, you set out in your report concerning eight year old children and 50/50 plan?

A Well, first of all, let me say, I'm not advocating any 50/50 plans and I never do. On occasion I think that 50/50 plans make sense and they begin to make sense for kids about E.L.M.C.'s age, or a little big younger. But I think what you have to do is weigh a lot of factors. Historically the profession, I think both the legal profession and the mental health profession were very opposed to these kinds of 50/50 plans. Over time, I think, as we've learned more, as we've seen more successful co-parenting arrangements, we've kind of come around to the idea that cooperative co-parenting works really well for kids. And some of those co-parenting arrangements can involve 50/50 plans. They don't have to be 50/50 plans, but some of them can be. I've seen a number [p. 160] that work quite well and I've seen a number that have been disasters. But I can say that about non-50/50 plans also. And so I can't say that I think that the -- at least in my data base of 50/50 plans -- that they're less successful than other kinds of plans that I've had to review over the years. One of the things that we can't do in our field is to do kind of guinea pig research where we say let's randomly assign these children to 50/50 plans and these children to 90/10 plans and see which ones do better. And so we have to kind of look at retrospective literature. We have to see well, what is it that really gets in the way. And, you know, frankly in terms of some of these questions about high conflict, persistent high levels of conflict are probably the thing that most get in the way of 50/50 plans, but they get in the way of 90/10 plans also.

Q You heard the testimony of Ms. Burk concerning how E.L.M.C. is doing at school?

A Yes.

Q And are you -- What factors do you look at in making a decision to perhaps change from a 50/50 plan to another parenting plan?

A I spend a lot of time in the deposition that Mr. Rouse gave me a few weeks ago saying, kind of saying my rule of thumb about if it's not broken, don't fix it. And the reason I said that is because that I -- the little information I had gotten is consistent with what the teacher had said. And so I'm not making any recommendations, but I am kind of saying, if a child is doing well historically, if you're looking at a child's adjustment and they're well adjusted, then I think you really need to say, well, what's the rationale for making a change, and the burden becomes, you know, proving that somebody's going to be better off than, you know, then they are now with the change, or why make it.

The kinds of factors I look at in changing a plan is that it really -- for whatever reasons it's not working for a child. A child might come to me and talk to me...

[p. 192]

... to addressing the correct mother (inaudible).

MS. WEITZENKORN: No further questions.

THE COURT: Doctor, thank you very much for you time. Have a good day.

DR. PRENNA: Thank you, Judge.

THE COURT: Bye now.

DR. PRENNA: Bye-bye.

THE COURT: Dr. Katz, could you come up, please.

CROSS EXAMINATION

BY MR. ROUSE:

Q Good morning, Dr. Katz, how are you this morning?

A Good, thank you.

Q I think you testified yesterday that you're primarily a professional witness, is that correct?

A No.

Q Isn't about 95 percent of your work related to court proceedings?

A I'm appointed as a special advocate or parental responsibility evaluator in most of my work.

Q So is most of your work court related?

A Yes.

Q And you've testified in court lots of times?

A I've -- Yes, over the years I've testified a number of times in all the metropolitan area courts.

Q In fact, when you are appointed to do these evaluations by the court or an attorney to asks you to do an evaluation, the assumption is that you may-- probably end...

[p. 207]

... potential for ongoing conflict between the adult parties?

A I totally agree with that.

Q Wouldn't this indicate that in general a high -- in a high conflict relationship a 50/50 parenting plan with the female child spending half her time with each adult party and the adult parties having joint decision-making is probably not going to be appropriate?

A I can't answer that question. You know, first of all, the research is about men and women divorcing. And, you know, Dr. Throckmore gave us an article that talked about kind of the spillover effect, it was a research project about the spillover effect in high conflict cases and it developed two different kind of models. One model was when parents have conflict with each other, one theory is that it spills over to the kids and affects them. A second theory is that they can contain their conflict between each other and it doesn't spill over. And that particular literature suggested that, you know, that

females are better abler to do the latter, not have it spill over. So, I just kind of want to point out that your own expert gave us an article that kind of talked about this in a different context. But again, that literature also suggested you had to look at the population. It said that there wasn't enough research, that there wasn't research done on the variety of families that are really out there. So I would be very limited in my, you know, conclusions about that literature. I just kind of wanted to point out that I would be very hard pressed to make conclusions on hypotheticals from research regarding this particular family about what should be done.

Q Didn't you testify yesterday that parenting time should not be affected by high conflict situations?

A I'm sorry?

Q Did you testify yesterday that parenting time should not be affected by...

[p. 209]

... child that's managed to do pretty well under the current arrangement. And so that -From my point of view, there may be rationales for changing it, but what are they, and they have to be pretty well reasoned to make a change regarding something that seems to be serving a child well at this time in her life.

Q So hypothetically speaking if we had a couple living together and the parenting was not 50/50 and the child was doing well, you wouldn't necessarily recommend the Court impose 50/50 parenting time.

A I might not recommend that. That's correct.

Q Doesn't Janet Johnston in her article of 1994 say that the value of frequent access to the non-custodial parent is questionable in a high conflict situation?

A She did say that. I remember looking at that in the article.

Q Now, would you take a look in the big white notebook there at Exhibits YY and ZZ please.

A Okay.

Q Are those the materials you received from Dr. McLeod?

A Yes.

Q And you read them in the course of preparing your report?

A Yes, I did. Well, the first, YY I did, but not ZZ.

Q Okay, ZZ was something that you received later.

A That's correct.

Q There's something about Rouse is harping about child care issues --

A Yeah, yeah.

Q -- or input, right?

A Yeah.

Q What was your reaction to the content and tone of Exhibit YY?

[p. 210]

A I think we covered this in the deposition, and as I remember I thought that Dr. McLeod presented some information about the history and I think that some of her feelings and frustration and hurt and anger and trying to figure out what's going on and trying to understand Dr. Clark in her own way kind of all came out in this -- this document.

Q Would you say that there's some hostility, anger and bitterness that came out in this document?

A I'd say there are a gamut of feelings that came out in this document.

Q In formulating your opinions in this case, you relied in part on the book called The Forced Wars -- Interventions with Families in Conflict by Elizabeth M. Ellis.

A Well, what I said, what I suggested to you in my bibliography was that this was a recent review of the literature basically, and, you know, as -- I used to tell people to get Bill Hodges' book on interventions and divorce, and then there really hasn't been another book that reviewed the field in the way that Dr. Hodges did ten or 15 years ago, and so this is a book that kind of does that, and it came out in the last two years, so it seemed like a good book to -- because it covers so much of the territory. So I don't know how much I relied on it, but it -- You know, I wanted you to know about it as -

Q As an authoritative source?

A Yeah, I think it's -- I don't agree with everything in this book, but I think it's a really nice summary of the field.

Q And it's published by the American Psychological Association, correct?

A Yes.

Q And doesn't Elizabeth Ellis in that book say the following, joint physical custody hailed as the solution to interparental conflict has been largely a disappointment. Parents in this arrangement relitigate as often as –

[p. 211]

THE COURT: Go a little slower. Somebody might have to type this up.

MR. ROUSE: Okay. I'll start over.

Q (by Mr. Rouse) Doesn't it, in fact, say joint physical custody hailed as the solution to interparental has been largely a disappointment. Parents in this arrangement relitigate as often as when one parent has primary custody of the children. Children do not fare better in joint physical custody and many fare worse when they are exposed to frequent, ongoing conflict at times of transition. Joint physical custody appears to be most successful when both parents want it and when both show high levels of emotional adjustment and low levels of anger, blame and distress.

A Well, I don't have this book memorized, --

Q You know, first of all --

A -- but I'm assuming that that's an accurate quote from the book. I have it if you want me to –

Q I thought that might be a problem you'd have not having this book memorized. If you've got the book (inaudible) same book.

A I do, yes.

Q All right. Would you please look at page 108 up in the top.

A Okay. So I -- What you quoted is on that first paragraph or on page 108.

MR. ROUSE: Your Honor, may counsel approach?

THE COURT: Yes. (Inaudible.)

Q (by Mr. Rouse) I think my last question was does the book Divorce Wars state what I just read to you?

A Yes, it does.

Q And do you prepare -- put any reliance on the work of Lamm and Kelly that advocates 50/50 parenting time for toddlers?

[p. 212]

A They don't advocate 50/50 parenting time for toddlers. What they're talking about is research that looks at the issue of multiple attachments and the issue that children attach to a variety of caretakers and, you know, I don't know how many ways and how many times I need to say that I'm not an

advocate of any particular parenting time plan. There are a number of parenting time plans that I've seen that I think are really bad, and I don't advocate those. But in -- You know, I'll rule out -- I've seen parents come to me with toddlers that they alternate on a daily basis, and I think it's terrible. I've seen parents that live, you know, four hours from each other and they try to do 50/50 plans, and it often turns out to be a disaster. So there are plans that I think really don't work, but I'm not advocating any particular plan. I'm simply saying let's look -You know, obviously, when you look at these things, as I said in my report, you have to look at a variety of factors in determining a parenting time plan.

Q In your report you say something, talking about alienation and say that the facts given to you speak less to parent alienation and more to the possibility that Dr. Clark may have a problem accepting the idea that E.L.M.C. has two significant caretakers in her life rather than one. That was in your report, correct?

A Yeah. Let me go back to my report, if you're -- notes over here. Okay.

Q That is what your report says, isn't it?

A Yeah. Let's -- This is under the section on alienation, is that what you said?

Q I believe, yes, let me find it here.

A Yeah, I just want to look at the whole context of what I said. Could you tell me what point that is, because I'm having -THE COURT: It's at ten, page -- paragraph 10.

A Okay, good. Thank you....

[p. 220]

... effect is a defense, and I think you would start to see that in a variety of ways. You know, it's the child -- It's the -- That, I think, gets into that issue of parentifying (phonetic) child. Children who learn to, you know, they become driven basically. And they're, you know, they're there to please their parents, they're there to meet their parents' needs in a variety of ways. But those children don't look very healthy, frankly. They achieve, and parents praise them left and right, but basically there are a lot of problems that develop for that particular population of kids.

Q If there is a situation where you have parents, or a couple, or adults in a high conflict situation, do you think it would be a good idea to leave the -- and one adult says, raise the kid with this religion, the other says raise him in another religion, do you think you ought to leave that to the parties?

A Well, I think that there needs to be some approach to it. I don't know what the approach should be. But it's obvious from what I've been hearing that this an area of dispute or conflict or something that -- There needs to be a solution to the problem that will allow E.L.M.C. to not become conflicted by a religious dispute.

Q Now, the KLMD case that you said you were involved in as a co-evaluator, didn't the court in that case order decreasing time with the lesbian couple that had had the child for a couple of years?

A Yes.

MR. ROUSE: Nothing further, Your Honor.

THE COURT: Thanks very much. You have a good day. We'll take a 15 minute recess.

Would the two ladies in the back come back into chambers for a second, please.

The Court is in recess.

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CERTIFICATE

I certify that I transcribed this record from the tape recording of the above-entitled matter which was heard on April 14 and April 15, 2003.

I further certify that the aforementioned transcript is a complete and accurate transcription of the tape-recorded proceedings recorded in this case on the above date, based upon the audio facilities of these tapes and my ability to understand them.

Signed this 2nd day of June, 2003.

/s/ _____
K.S. Trostel

APPENDIX S

DISTRICT COURT,
CITY & COUNTY OF DENVER, COLORADO
Court Address 1437 Bannock St., Room 256
Denver Colorado 80202

Case Number 96 DR 39
Courtroom 21

In Re the Custody and Support of:	)
	)
E.L.M.C.,	)
minor child	)
	)
And concerning	)
	)
CHERYL ANN CLARK and	)
ELSEY MAXWELL MCLEOD,	)
Co-Petitioners.	)
	)

PETITIONER'S EXHIBIT CLARK GG

Attorney for Co-Petitioner Cheryl Ann Clark:

Name: James P. Rouse
Amy d. Desai
Rouse & Associates, P.C.
Address: 7400 E. Orchard Road, Suite 3000,
Greenwood Village, CO 80111
Phone Number: 303-694-0694

FAX Number: 303-694-0630
E-mail: jrouse@rouseandassoc.com
Atty.Reg.#: 10675 (Rouse), 30112 (Desai)

DR. CLARK'S PROPOSED PARENTING PLAN

This form may be used for several purposes:

As a [ ] **PERMANENT PARENTING PLAN UNTIL EXPIRATION ON AUGUST 18, 2005 WHEN ALL LEGAL MATTERS IN THIS CASE WILL CEASE TO HAVE BINDING EFFECT.**

1. INFORMATION ABOUT THE CHILD(REN)

Name	**Sex**	**Date of Birth**	**Soc. Sec. No.**
E.L.M.C.	Female	11/12/1994	521-99-9000

(Hereinafter referred to as ELMC)

2. REMOVAL FROM THE STATE

Removal means that one of the parties may decide to move out of the State of Colorado with the child(ren).

As ELMC's sole legal parent, removal from the state will be at Dr. Cheryl Clark's sole discretion.

3. PARENTING TIME

A. WEEKDAY AND WEEKEND SCHEDULE

Until August 18, 2003, ELMC will be in Dr. Clark's care from 3:30 PM on Friday until 3:30 PM the next Friday and in Dr. McLeod's care on the alternate week for the

same schedule (except for ELMC's summer dismissal from school which is dealt with later.) On Wednesday each week ELMC will be with the party with whom she is not scheduled for the week from 3:30 PM until 7 PM.

Beginning August 18, 2003, ELMC will primarily reside with her mother, Dr. Clark, during the school year and will have parenting time with Dr. McLeod every other Thursday after school until start of school on Monday commencing with Thursday, August 21,2003. On the weeks where ELMC is not with Dr. McLeod for the extended weekend, ELMC shall spend Wednesdays from dismissal from school until 7 PM when she will return to her residence with Dr. Clark.

Beginning August 18, 2004, ELMC's parenting time with Dr. McLeod will be from Friday, after school until Monday start of school every other weekend and the mid-week visit will cease.

Beginning August 18, 2005 all court-ordered parenting time between ELMC and Dr. McLeod will cease. At that time ELMC will be old enough to work with her mother, Dr. Clark, to determine a mutually agreed upon parenting time schedule with Dr. McLeod that does not unduly interfere with Dr. Clark and ELMC's home life. At the time of the cessation of court-ordered parenting time between ELMC and Dr. McLeod, Dr. Clark and Dr. McLeod will work together to set up mutually agreed upon time that fits with Dr. Clark's and ELMC's plans, vacations and other commitments.

Transportation arrangements will be provided by:
By each party at her own expense.

The parties may change ELMC's weekday and weekend schedule by mutual written agreement only.

B. SUMMER SCHEDULE

[ ] Except for the summer of 2003, the weekday and weekend schedule above will apply for all twelve (12) calendar months, with no specific changes during summer unless mutually agreed to by both parties in writing. The summer schedule shall cease at the time that the court-ordered parenting time ceases on August 18, 2005.

[ ] Each party will have 2, one week vacations during the summer months until such time as court-ordered parenting time ends on August 18, 2005.

[ ] Each party will provide to the other party her summer vacation requests by February 1st of each year preceding the summer to which the vacation dates apply. If there is a conflict over the vacation dates the parties will reach agreement by February 15th or in even years Dr. Clark will have first choice of vacation dates and in odd years, Dr. McLeod shall have first choice.

[ ] For the summer of 2003 the schedule previously agreed to by stipulation and court order for the summers of 2001 and 2002 shall be followed as a template whereby the summer is divided equally between the parties. ELMC generally spends Monday 8:30 AM until Thursday 3:30 PM With Dr. McLeod and from Thursday 3:30 PM until Monday 8:30 AM with Dr. Clark. This schedule takes into consideration that Dr. McLeod does not work during the summer months while Dr. Clark does work, but attenuates her schedule.

[ ] For the summer of 2003, except for when either party is scheduled for vacation, the parties will alternate week to week taking ELMC to piano lessons on Mondays and will also alternate taking ELMC to gymnastics on Wednesdays

such that one week Dr. McLeod will take ELMC to piano lesson and that same week Dr. Clark will take her to gymnastics and out to dinner per the regular schedule during the school year and then on the alternate week Dr. McLeod will take ELMC to gymnastics and Dr. Clark will take her to her piano lesson.

[ ] For the summer of 2003 Dr. McLeod will have 3, 7 day periods of vacation time and Dr. Clark will have 2, 7 day periods of vacation time. The rest of the summer will be divided equally per the above template.

C. CHILD(REN)'S TRAVEL

[ ] **Arrangements regarding the child(ren)'s travel:** Should either party travel out of state, the traveling party will notify the other party of the travel plans, address(es) and telephone number(s) where the traveling party and the child can be reached. In addition if either party is traveling with ELMC in state, but out of the Denver Metro area for more than 48 hours the traveling party will provide the same information as above to the other party.

D. HOLIDAY SCHEDULE:

The following holiday schedule will take priority over the regular weekday, weekend, and summer schedules discussed above. The regular schedule shall resume when the holiday time is completed. <u>This holiday schedule will cease upon termination of all court ordered parenting time between Dr. McLeod and ELMC on August 18, 2005:</u>

[ ] **Spring Vacation :** 2003 with Dr. Clark and 2004 with Dr. McLeod and 2005 with Dr. Clark. The dates of

Spring Vacation commence with the end of school on Friday and cease with recommencement of school on the Monday following Spring Break.

[ ] **Winter Break:** ELMC's winter break shall be divided into equal halves. Whoever is scheduled for Christmas Eve/Day with ELMC will have the first half of ELMC's Winter Break commencing upon dismissal the last day of school prior to the start of the break. Whoever is scheduled to spend New Year's Eve/Day with ELMC will have the second half of Winter break. Since Dr. Clark had Christmas in 2002, Dr. McLeod will have Christmas Eve/Day in 2003 and Dr. Clark in 2004. The exchange time will be at 3:30 PM after the first half of the winter break concludes. If for some reason Christmas does not fall on the first half of Winter break then the party scheduled for Christmas will have ELMC from 3:30 PM on Christmas Eve until 8:30 PM on Christmas Day.

[ ] **Memorial Day Weekend:** Begins at 8 AM on Friday and ends with start of school on Tuesday. Since Dr. McLeod had Memorial Weekend in 2002, Dr. Clark will have Memorial Day Weekend in 2003, Dr. McLeod in 2004 and Dr. Clark in 2005.

[ ] **July 4th:** Since Dr. McLeod had July 4th in 2001 and 2002, Dr. Clark will have July 4th in 2003 and 2004. Dr. McLeod shall have 2005. The holiday will begin at 3:30 PM on July 3rd and end at 12:00 PM on July 6th. This holiday may be added to the summer vacation plans of the party scheduled for the holiday that year if she wishes.

[ ] **Halloween:** Since Dr. McLeod had this in 2002, Dr. Clark will have in 2003, Dr. McLeod in 2004. It begins at 3:30 pm on October 31 and ends with commencement of school on November 1. If Halloween falls on a weekend it will commence for the scheduled party at 3:30 PM on October 31 and end at 10 AM on November 1.

[ ] **Labor Day Weekend:** Dr. Clark in 2003, Dr. McLeod in 2004. This holiday commences at 8 AM on Friday preceding the holiday and ends upon return to school on Tuesday.

[ ] **Thanksgiving Break:** Dr. Clark in 2003, Dr. McLeod in 2004. The holiday begins at 8 AM on Wednesday and ends with recommencement of school on the Monday following Thanksgiving Day.

[ ] **Martin Luther King weekend:** From 8 AM on Friday through recommencement of school on Tuesday. Since McLeod had this weekend in 2003, Dr. Clark shall have this 3 day weekend in 2004 and Dr. McLeod in 2005.

[ ] **President's Day weekend:** From 8 AM on Friday through recommencement of school on Tuesday. Since Dr. McLeod had this weekend in 2003, Dr. Clark shall have this 3 day weekend in 2004 and Dr. McLeod in 2005.

[ ] **Dr. Clark's and Dr. McLeod's birthdays:** Each party may have ELMC on her birthday, if she so desires and this will be an overnight. If the party's birthday occurs on a Saturday or Sunday, and the party is not already scheduled for time for that

weekend, they shall have ELMC from 10 AM on the day of their birthday and overnight, returning to the regularly scheduled party at 10 AM the next day unless it is a Sunday, then ELMC will return to school.

[ ] **Other Special Occasions such as overnight field trips from school:** Will go first to the party regularly scheduled for the first overnight parenting time at the start of the field trip. If this party is unable to attend for whatever reason the other party may go on the overnight field trip. If, by virtue of the regular schedule, the next overnight field trip also falls on that party's scheduled time again they shall not have that field trip, but it will go to the other party.

[ ] **Cleo Parker Robinson week for Summer Institute:** Will alternate yearly between the parties starting with Dr. Clark in 2003 and 2004 to make up for the two years in a row that Dr. McLeod had in 2001 and 2002. Dr. McLeod will have this week in 2005. The party scheduled for the week that year shall commence her parenting time at 12 noon the Sunday preceding the start of the dance camp and her time shall cease at 8:30 AM on the Monday following the end of the week of dance camp.

[ ] **Chinese Heritage Camp:** Shall be with Dr. Clark in 2003 and Dr. McLeod in 2004 and then Dr. Clark in 2005. If the camp continues to be on Labor Day weekend then the holiday schedule and the camp schedule will coincide. If the camp changes to another time frame during the summer then the party scheduled for that year will have that time frame for

camp with reasonable travel time to arrive at the camp that is held out of the Denver Metro Area.

[ ] **Other parenting time issues:** In the event that either party must leave ELMC for forty-eight (48) hours or more during their regularly scheduled parenting time, that parent shall give the other parent the first option to care for ELMC. If the other party is unable, for any reason, to care for ELMC the party needing to take the time away from ELMC shall be responsible for obtaining and paying for child care.

[ ] **Illness that prevents the exercise of scheduled parenting time:** If for any reason ELMC is ill and that prevents her from exercising scheduled parenting time with either party, make-up time shall be afforded to ELMC with the party who missed the parenting time with her.

[ ] **Funeral accommodations:** In the event of the death of an immediate family member of either adult party (mother, father, brother, sister, brother-in-law, sister-in-law, nieces or nephews, grandparents) of either party the parties shall rearrange the parenting time schedule to allow ELMC to attend the funeral. If this involves out of state travel it shall not exceed 5 days and 6 nights. If it is an in state funeral then it shall not exceed 2 nights and 3 days.

The parties may make substantial, permanent modifications to the Parenting Time Schedule only by written agreement, signed by both parties and filed with the Court. Minor, nonpermanent changes may be made anytime that both parties agree to the changes.

E. TELEPHONE ACCESS

[ ] Each party may call ELMC on a Monday when she is not scheduled with ELMC between 7:15-7:45 PM and also at any time that she needs to speak with ELMC regarding other matters.

F. ACCESS TO RECORDS: As ELMC's sole legal parent all access to records shall be at Dr. Clark's discretion.

4. DECISION-MAKING

[ ] MAJOR DECISION-MAKING: BY DR. CLARK ONLY AS ELMC'S SOLE LEGAL PARENT IN ALL AREAS OF EDUCATION, RELIGIOUS UPBRINGING, MEDICAL AND OTHER HEALTH MATTERS.

[ ] Minor day to day decision making by Dr. McLeod while ELMC is spending time with her is acceptable, however, should ELMC need to be enrolled in any activity requiring parental consent this must be discussed with Dr. Clark in advance for her consent.

D. EXTRACURRICULAR AND RECREATIONAL ACTIVITIES

Dr. McLeod may make a final decision for activities that occur only during her time with ELMC.

5. EMERGENCIES (OTHER THAN MEDICAL)

Dr. Clark agrees that, under emergency circumstances, it is sufficient for Dr. McLeod to sign legal releases or

to take other necessary measures to protect ELMC's life and health, however, Dr. McLeod must notify Dr. Clark within 3 hours of such an emergency and provide Dr. Clark with all necessary information.

6. FUTURE CONFLICT RESOLUTION

If the parties do not reach an agreement on any issue involving the parenting plan,

[ ] The parties may ask the Court to resolve the dispute.

[x] The parties will submit any non-emergency dispute to mediation or arbitration and if it fails (choose one(1))

[ ] The final decision will be made by the Court

OR

[x] The final decision will be made by [x] Dr. Clark

Mediation and/or arbitration will be conducted by the Judicial Arbitration Group. Any alternative dispute resolution shall be paid 50 % by Dr. Clark and 50 % by Dr. McLeod

7. ADDITIONAL ARRANGEMENTS *(Check all that apply and fill in appropriate information.)*

[ ] Both parties agree that each will promptly inform the other of any emergency or other important event that involves the child(ren).

[ ] Both parties will consult one another and work out an agreement regarding any extra activity of the child(ren) which affects the child(ren)'s access to the other party.

[ ] Both parties agree that all communications regarding the child(ren) will be between the parties and that they will not use the child(ren) to convey information or to set up parenting time changes.

[ ] Both parties agree that they will not belittle or criticize the other party in front of the child(ren).

8. COMPLIANCE WITH STATE AND FEDERAL STATUTES

The child(ren) named in this parenting plan is/are scheduled to reside the majority of the time with **Dr. Clark. Dr. Clark** is designated the custodian of **ELMC** for the purposes of all federal and state statutes which require a designation or determination of custody.

PLEASE <u>RE-READ</u> THIS DOCUMENT CAREFULLY TO MAKE SURE IT IS AN ACCURATE REPRESENTATION OF EITHER YOUR AGREEMENT WITH THE OTHER PARTY OR YOUR PROPOSED PARENTING PLAN.

YOUR SIGNATURE BELOW INDICATES THAT YOU HAVE READ AND AGREE WITH EVERYTHING IN THIS DOCUMENT.

BEST AVAILABLE COPY

Petitioner:

_____

Signature

_____

Address

_____

City, State, Zip Code

_____

(Area Code) Telephone Number (home)

_____

Area Code) Telephone Number (work)

[ ] Respondent [ ] Co-Petitioner (check one):
Petitioner:

_____

Signature

_____

Address

_____

City, State, Zip Code

_____

(Area Code) Telephone Number (home)

_____

(Area Code) Telephone Number (work)

APPENDIX T

MILLS & WEITZENKORN, P.C.
Attorneys At Law

Denise K. Mills
Gina B. Weitzenkorn

1441 Eighteenth Street, Suite 150
Denver, Colorado 80202
Telephone: (303) 292-1441
Facsimile: (303) 292-1126

March 17, 2003

Via Facsimile

James Rouse
7400 East Orchard Road
Suite 3000
Greenwood Village, Colorado 80111

Re: McLeod/Clark matter
File No. M511-00

Dear Mr. Rouse:

Enclosed are the documents Dr. Katz reviewed prior to writing his report. You have received the bibliography from Dr. Katz.

Please forward to me all documents, professional papers, and other materials Dr. Throckmorton reviewed in forming his opinions and preparing his report.

Sincerely,
MILLS & WEITZENKORN, P.C.

/s/ _____
Gina B. Weitzenkorn

Enclosures
xc: Elsey McLeod (w/encls.)

...for the first years, so we had our time with E.L.M.C. without the other when the other was working.

-Dynamic started early on where ex-partner decided consciously to come between E.L.M.C. and me (she told me this and therapist) and I protectively defended my relationship with E.L.M.C.
-We developed a pathological dividing of time with E.L.M.C. to make it "equal" from very early on
-Ex-partner would do everything in her power to pull E.L.M.C. towards her and away from me. Ex-partner says I excluded her when with E.L.M.C.
-We never could resolve these issues, even through 2 couples therapies
-In my opinion, these are the same issues we are now battling in court
-In my opinion, this pulling on E.L.M.C. and vying for her attention/love was extremely destructive emotionally and needed to be stopped. The only way I felt I could stop it was to leave and fight for 50-50.

-I left my ex for a multitude of reasons, but this issue with E.L.M.C. caused a rift between us that was never resolved and obviously still persists

-I feel my ex does not have the capacity to resolve issues, negotiate, compromise etc.

-Although I repeatedly said I would leave if our relationship did not improve, she never really believed me, and the injury she experienced when I left her and started legally fighting for my rights with E.L.M.C. caused a rage that still is intense and greater than it seems possible. When she really got it that I was leaving and I wanted to be a parent for E.L.M.C. along with her, she de-compensated, had her father come and stay with us, and relatively quickly went over to the born-again church and her family who are all born-agains.

-My ex-partner has become the very person she has fought against and hated.

-

-Ex-partner now says she is only parent (this is her original wish I believe, that originally was unconscious and now conscious, as I am made the enemy)

-Ex-partner has recreated our history together in a distorted and delusional way

-In my opinion, ex-partner has an extreme Narcissistic Personality Disorder, an Obsessive Disorder (and I am the obsession), and a Mood Disorder, either just depression or bi-polar. She was suicidal, with a plan and note, when E.L.M.C. was about 21/2 because E.L.M.C. was so attached to me.

-I can't decide if she is psychopathic or sociopathic.

-Ex-partner now says she is not lesbian and prays in born-again church to not be lesbian. Ex-partner was anti-religion all adulthood until now (She is 45)

-Ex-partner takes our daughter to this homophobic church

APPENDIX U

DISTRICT COURT,
CITY & COUNTY OF DENVER, COLORADO
Court Address 1437 Bannock St., Room 256
Denver Colorado 80202

Case Number 96 DR 39
Courtroom 21/15A

Motion Granted
J. Coughlin
September 11, 2003
Referred to courtroom 21 From courtroom 15A

[Dated September 3, 2003]

In Re the Custody and Support of:	)
	)
E.L.M.C.,	)
minor child	)
	)
And concerning	)
	)
CHERYL ANN CLARK and	)
ELSEY MAXWELL MCLEOD,	)
Co-Petitioners.	)
	)

Attorney for Co-Petitioner Cheryl Ann Clark:

Name: James P. Rouse
Amy D. Desai
7400 E. Orchard Road, Suite 3000
Greenwood Village, CO 80111
Phone Number: 303-694-0694
FAX Number: 303-694-0630
E-mail: jimrouseatty@cs.com
Atty.Reg.#: 10675 (Rouse), 30112 (Desai)

MOTION TO SETTLE AND APPROVE RECONSTRUCTED TESTIMONY OF DR. THROCKMORTON APRIL 15, 2003, PERMANENT ORDERS HEARING FOR INCLUSION IN THE RECORD ON APPEAL

Comes now Co-Petitioner/Appellant Dr. Cheryl Clark, by and through counsel, Rouse & Associates, P.C., and submits the attached Reconstructed Testimony of Dr. Throckmorton April 15, 2003, Permanent Orders Hearing, as it was submitted to opposing counsel on August 18, 2003. The attached reconstructed direct exam testimony of Dr. Warren Throckmorton was given on April 15, 2003, in the Permanent Orders Hearing in this case. This reconstructed testimony is submitted for inclusion in the Record on Appeal, Court of Appeals case number 03 CA 1121, under C.A.R. 10(c).

1. Pursuant to C.A.R. 10(c), the attached document was submitted to opposing counsel on August 18, 2003.

2. On or about August 28, 2003, opposing counsel submitted only one addition to the attached reconstruction of Dr. Throckmorton's direct examination testimony. That addition was that "Dr.

Throckmorton testified that he last testified in 1993. He stated had worked on 30-30 divorces prior to that time and had been involved in 10-15 custody evaluations in Ohio." (This proposed addition was included in a proposed…

APPENDIX V

DISTRICT COURT,
CITY & COUNTY OF DENVER, COLORADO
Court Address 1437 Bannock St., Room 256
Denver Colorado 80202

Case Number 96 DR 39
Courtroom 21/15A

[Dated September 3, 2003]

In Re the Custody and Support of:	)
	)
E.L.M.C.,	)
minor child	)
	)
And concerning	)
	)
CHERYL ANN CLARK and	)
ELSEY MAXWELL MCLEOD,	)
Co-Petitioners.	)
	)

Attorney for Co-Petitioner Cheryl Ann Clark:

Name: James P. Rouse
Amy D. Desai
7400 E. Orchard Road, Suite 3000
Greenwood Village, CO 80111
Phone Number: 303-694-0694
FAX Number: 303-694-0630

E-mail: jimrouseatty@cs.com
Atty.Reg.#: 10675 (Rouse), 30112 (Desai)

MOTION TO SETTLE AND APPROVE RECONSTRUCTED TESTIMONY OF DR. THROCKMORTON APRIL 15, 2003, PERMANENT ORDERS HEARING FOR INCLUSION IN THE RECORD ON APPEAL

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2. On or about August 28, 2003, opposing counsel submitted only one addition to the attached reconstruction of Dr. Throckmorton's direct examination testimony. That addition was that "Dr. Throckmorton testified that he last testified in 1993. He stated had worked on 30-30 divorces prior to that time and had been involved in 10-15 custody evaluations in Ohio." (This proposed addition was included in a proposed reconstruction by Dr. McLeod of cross-examination testimony, which reconstruction is being reviewed by Dr. Clark's counsel and for which the time to respond has not yet passed.)

3. Dr. Clark agrees with this addition with the clarification that Dr. Throckmorton stated he had worked on 30-40 divorce cases (correcting the typo of 30-30).

4. Pursuant to C.A.R. 10(c), Dr. Clark now submits this substantially unopposed Reconstructed Testimony of Dr. Throckmorton (attached hereto) and requests the District Court Judge to approve the same for inclusion in the Record on Appeal, with the noted additions in paragraphs 2 and 3 above.

5. Counsel for Dr. Clark hereby certifies to the Court that they have taken all reasonable steps to ensure the accuracy of the attached reconstruction and have met or exceeded the requirements of the applicable rules.

Respectfully submitted this 3rd day of September, 2003.

Rouse & Associates, P.C.

/s/ _____

James P Rouse,
Amy D. Desai, 30112
Attorneys for Co-Petitioner/Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 3rd day of September, 2003, she served the foregoing *Motion to Accept Reconstructed Testimony of Dr. Throckmorton,* by depositing a true and correct copy of the same in the mail, postage paid, to opposing counsel at the address below:

Gina B. Weitzenkorn
Mills & Weitzenkorn, P.C.
1441 18th Street, Suite 150
Denver, CO 80202

/s/ _____
Amy D. Desai

APPENDIX W

DISTRICT COURT,
CITY & COUNTY OF DENVER, COLORADO
Court Address: 1437 Bannock St., Room 256
Denver Colorado 80202

Case Number 96 DR 39
Courtroom 21/15A

[Dated August 18, 2003]

In Re the Custody and Support of:	)
	)
E.L.M.C.,	)
minor child	)
	)
And concerning	)
	)
CHERYL ANN CLARK and	)
ELSEY MAXWELL MCLEOD,	)
Co-Petitioners.	)
	)

Attorney for Co-Petitioner Cheryl Ann Clark:

Name: James P. Rouse
Amy D. Desai
7400 E. Orchard Road, Suite 3000
Greenwood Village, CO 80111
Phone Number: 303-694-0694
FAX Number: 303-694-0630

E-mail: jimrouseatty@cs.com
Atty.Reg.#: 10675 (Rouse), 30112 (Desai)

RECONSTRUCTED TESTIMONY OF DR. THROCKMORTON APRIL 15, 2003, PERMANENT ORDERS HEARING

Comes now Co-Petitioner/Appellant Dr. Cheryl Clark, by and through counsel, Rouse & Associates, P.C., and submits the following reconstructed testimony of Dr. Warren Throckmorton, as given on April 15, 2003, in the Permanent Orders Hearing in this case. This reconstructed testimony is submitted for inclusion in the Record on Appeal, Court of Appeals case number 03 CA 1121, under C.A.R. 10(c).

Direct Examination Testimony of Dr. Warren Throckmorton, given on April 15, 2003. "R" = James P. Rouse, "T"= Dr. Warren Throckmorton

R. What is your name?

T. Warren Throckmorton

R. What is your occupation?

T. I am Director of College Counseling and Associate Professor of Psychology at Grove City College.

R. Would you briefly highlight for us those items in your CV and in your career that relate to parent and child or parenting time issues?

T. I have taught child development classes at the college level and was the Director of the Child Development Associate training program at Shawnee State University.

While I was in private practice of counseling, my specialty was child mental health and I had contracts to provide observation and consulting services to 4 Head Start programs and the Scioto County Children's Services agency. I conducted numerous trainings for the children's service's foster parents and provided expert testimony on a biweekly basis to the Juvenile Court on behalf of the agency. I have a masters in clinical psychology and a doctorate in counseling.

I also had occasion to be asked by the court to conduct 10 custody evaluations during my time in private practice.

R. What in your training or experience gives you expertise on the effects of divorce and remarriage on children and families?

T. As well as the experience I just described, my masters and doctoral training each had specialty concentrations in child development and counseling.

I am a certified Active Parenting trainer and a certified Child Development Associate trainer and have conducted numerous parenting workshops and court directed parenting classes.

R. What experience have you had relating to child and adult psychopathology?

T. In addition to my masters and doctoral degrees, both of which required course work in psychopathology, I have been in continuous practice of psychotherapy since 1982 seeing a wide range of clinical conditions. I also teach the Abnormal Psychology class at Grove City College.

R. Do you have any expertise or experience in clinical assessment techniques?

T. My graduate training provided full academic and practicum preparation in assessment and I have used such tools as the MMPI, Wechsler Intelligence Scales, Rorschach and other tool in practice with children and adults.

R. What knowledge do you have concerning the legal and ethical requirements of custody and parenting time cases?

T. I have had such training in my academic preparation and approximately 30 hours of continuing education on this subject.

R. The publications in your C.V., which you authored, how many of them are peer reviewed articles?

T. Thirteen.

R. Are those 13 articles literature reviews?

T. All but one; one is an empirical study of the counseling process. I have two empirical studies concerning homosexuality under peer review currently.

R. Have you testified as an expert witness in court in the past?

T. Primarily, about the disposition of cases involving child placement and foster care assignments. I frequently testified concerning the mental status of parents for the benefit of courts seeking to make custody decisions. I also testified in a case involving post-traumatic stress disorder.

R. On the last page of your C.V., what is this "special award of merit" from the Scioto County Children's Services Board?

T. It was given in recognition of the work I did for this agency. Specifically, my commitment to providing the best clinical services possible to foster and abused children as well as my availability to find the best possible placements for each child was cited.

R. Move to qualify Dr. Throckmorton as an expert in the following areas: Effects of divorce on children, appropriate parenting techniques, child development, child and adult psychopathology, clinical assessment techniques and attachment issues.

Ms. Weitzenkorn: Objection to Dr. Throckmorton as an expert in those fields.

Court: Overruled. Dr. Throckmorton is accepted as an expert in all fields offered by Mr. Rouse.

R. How did you come to testify in this court today?

T. I was asked by your associate, Amy Desai.

R. Have you evaluated the child or parties in this case?

T. No.

R. In your opinion, is there research that would be helpful to the court in this case, and if so what does that research tell us?

T. Yes, there is relevant literature. As I understand the situation from reviewing the past court documents and materials provided to me, this appears to be a high conflict split of a living together relationship. The legal parent in the situation and her former partner both want decision-making authority. The former partner is not a legal parent but still wants shared parenting time with the child. According to the professional literature on shared parenting time, high conflict situations are not the optimal situations for shared parenting arrangements. Said another way, when there is high conflict between persons separating a relationship, joint custody or 50-50 shared parenting can result in medium to long-term problems for the children involved.

R. How would you describe a high conflict relationship?

T. In the professional literature, most notably the research and writing of Johnston, it is generally considered high conflict if the separating parties engage in some or all of the following: disputes over all matters relating to rearing the children, adults disparaging the other adults in the child's life, caregivers lying about each other, multiple court actions over years of time, verbal abuse and physical violence. Some of these behaviors are difficult to prove or observe. One of the more objective measures is the number of times in mediation or length of time in dispute over custody issues.

R. Does there need to be physical abuse of mental disturbance to qualify the situation as high conflict?

T. No, as I mentioned any of the factors I mentioned could render the situation high conflict as perceived by the adults or children.

R. I'm going to present you with a hypothetical situation, and I would like you to discuss it with me in light of the research you mentioned. Would you please pay close attention to these aspects? Assume Dr. Throckmorton that two women lived together in the same house in a lesbian relationship for several years. Assume that one of the women legally adopted a child. Assume that shortly after the baby was brought home, the women began to disagree quite a bit about the raising of the child. The adoptive parent believed the other was interfering with her relationship with the child and was nitpicking her parenting decisions, and felt that the other was too smothering of the child and did not have appropriate boundaries. Assume also that the other woman believed that the adoptive parent did not have appropriate boundaries. Eventually, when the child was about 6.5 years old, the women decided to split up. At the time of the break up, the women argued over the house and property division and over the child.

Assume that a court order went into effect, forcing the women to have rotating weeks (50-50) time with the child, and forcing them to make joint decisions for the child. Assume that the women have been involved in an ongoing legal dispute over parenting issues, and that they have been to court 4 or 5 times in the past two years, along with several mediation sessions, after which they continue to disagree. Assume that one party demands that everything be 50-50, to the detail of alternating doctors and dentist appointments so that each takes the child every other time, and that the parties argue over the division of field trips the child has in school and day camps the child attends. Assume the last court order was that the parties divide the summer between them and that they have managed to agree on a summertime schedule only after 8 months of discussion and 4 two-hour mediation

sessions. Otherwise they rarely, if ever, agree on anything concerning the child.

Assume further that both parties are unable to get along with each other and that at least one party is always emotionally upset after the mediation sessions, that one party disapproves of the other party's church and of taking the child to church and that one party had the child's ears pierced without telling the other party. Also that one party sent a letter to the child's orthodontist raising issues the other party thought was inappropriate to raise. Assume that one party describes the other in derogatory terms to a mental health professional. Also assume that after the parties broke up, one party, became serious about her religious faith and that she began attending church with the child and the other party attacked that decision as "homophobic."

Assume that the communication between the two women is disruptive and upsetting to both and that one feels the other attempts to control her and that she also feels emotionally abused. Also assume that the woman who did not adopt the child demands that third parties - teachers, pediatricians and others - recognize her as a legal parent and that she receive all records relating to the child. Assume that the legal adoptive parent does not consider the other party as a parent. However, assume that the other party demands joint decisions on everything including which church the child goes to. Finally, assume that one party believes the relationship is high conflict but that the other party initially agreed it was high conflict but now says mediation is all that is necessary.

How would you describe the likely relationship between these two adults?

T. As you describe it, I would view it as a very conflictual situation. I think it would qualify as a high conflict situation as I understand the literature on the subject.

R. What are some of the salient factors that stand out in making it high conflict?

T. The frequent mediations and the length of time in dispute over decisions concerning the child. The length of time it took to arrange a summer schedule is an example. The emotional toll on both parties also is salient. The level of disagreement seems pretty substantial. If they cannot agree without mediation then the conflict is likely to mark all of their communications. Involving other people in the community and in the child's world without cause is another feature of the conflict spilling out of the family context. The inability of one party to see the inappropriateness of such conduct demonstrates the pervasiveness of the conflict.

R. In your report, you indicated that if there is high conflict between two women one of whom is the legal parent, the legal parent should have primary care and sole decision-making. Why?

T. Someone has to captain the ship. Someone has to be the final authority, especially for children who will soon be entering adolescence. If the legal parent has the responsibility for the child, she should have the authority to provide appropriate parental guidance. Otherwise, the child is left to feel confused about who she really answers to. She also will be much more likely to play both adults against each other. If she can't get what she wants from one parent she will try to guilt that parent by saying she will ask the other party. When every decision must be mediated, the pressure on the legal parent to give in will be immense. Furthermore, it appears

that under a 50-50 arrangement in a high conflict situation, the real parent will be the mediator. The mediator will be raising the child when the two adults cannot agree. So in this situation when the legal parent has the responsibility for the child's well being, the authority should also belong to the legal parent.

R. What effect can such a 50-50 arrangement have in a high conflict situation?

T. As mentioned, a child may become confused or manipulative or both. According to the literature, children in such situations are likely to have difficulties socially, emotionally and academically.

R. You've heard testimony that the child in this case is doing well in school and doing fine overall, and you've heard Dr. Katz testify that his opinion is "if it ain't broke, don't fix it." Do you agree with that sentiment?

T. Not in the situation you have described. Also, apparently no one has evaluated the child in any depth so we are only going on obvious behavioral reports that do appear to be quite fine. An evaluation of the child might uncover hidden issues. However, whatever her current adjustment, I would say, lets fix it before it brakes. She is now in a stage of moral development wherein she is fairly compliant and focused on making the adults in her life happy. Soon she will be moving into a more self absorbed morality where she will judge the appropriateness of her actions based on how they impact her situation. In other words, given the 50-50 arrangement and the level of inherent conflict here, I think she could become quite manipulative between the two women. The current situation if left as it stands is an accident waiting to happen.

R. Based on the available research, should the sexual orientation of the adults be an issue in a case involving parenting time between two adults and a child?

T. The literature is so new and basically unreliable that I could not say one way or the other.

R. Axe you familiar with the gay parenting studies Dr. Katz referred to?

T. Yes.

R. Based on the hypothetical situation I described are those studies relevant?

T. Only peripherally in that one party currently identifies as a lesbian. But I don't see any direct relevance since the studies that I have reviewed do not in any systematic way evaluate the impact of separating lesbians upon the adjustment of children. Most of the work is anecdotal and even the empirical work is based on such small sample sizes that I could not in good conscience generalize them to the larger population and certainly not to the situation you described.

R. Dr. Throckmorton, you've heard testimony that there is a concern that a church might be homophobic. Have you done any study on homophobia? If so, what were your findings?

T. Homophobia is a catch all term for any negative reaction to gays, lesbians and bisexuals. However it literally means and was originally conceptualized as an irrational fear of homosexuals. I studied the reactions of religiously conservative, heterosexual college students to various

descriptions of activities and situations involving homosexuals. My purpose was to find out if homophobia was indeed any negative reaction or if it should be considered more narrowly as a fear of proximity to gays.

What I found was that the reactions of religious participants was multifaceted. The participants had no fear of close proximity or even aversion to working with or interacting with gays. The only way the subjects expressed any negativity was in their beliefs about themselves and homosexuality. In other words, the participants believed homosexuality was wrong morally and not an option for them personally but this belief did not lead them to avoid homosexuals or have prejudice against them as defined by avoiding people who were gay.

So said differently, the beliefs did not lead to homophobia in the narrow sense. It is inappropriate to label certain beliefs or creeds homophobic simply because they have a different, even if negative moral evaluation of homosexuality than a person who identifies positively as gay. It is quite possible and in my study was the norm for people to maintain a conservative religious position concerning homosexuality and still be quite un-homophobic in other, behavior ways.

R. In a situation like the hypothetical I described earlier, where religion is an issue if serious disagreement between adults, what is the way you would recommend that kind of issue be dealt with?

T. As I understand it, courts have ruled that legal parents have the right to direct the religious instruction of their children so I would assume that the legal parent would have that call to make. In a disagreement over religion, I think someone needs to have the authority to make the decision

about religious observance but be sensitive to the differences and explain the differences to the child. Naturally respect for the differing beliefs should be modeled and communicated. As I mentioned it would be possible and indeed likely for that to occur in this situation since disapproval of a given behavior or set of life choices is not necessarily to disrespect those choices.

R. Do you recognize this document? (Referring to Dr. McLeod's exhibit 27 - Dr. McLeod's parenting plan)

T. Yes.

R. Have you reviewed this document?

T. Yes.

R. Based on your experience with children and parenting plans, if a parenting plan similar to this one were applied to the hypothetical situation I described to you, what is your opinion about the likely or potential outcomes?

T. As I implied before I think this plan is an accident waiting to happen. This plan has such an obsessive preoccupation with equality that the child is lost. In such a plan, especially given the high conflict profile here, the mediator will raise this child. All decisions that can't be worked out will go to mediation. In this plan, everything must be mutually decided and with two people who cannot agree on much, this is a recipe for disaster and stagnation.

R. What do you base that opinion on?

T. My review of the available literature on separating parents in high conflict situations. For instance, there is a

provision that any decisions about field trips and the like be jointly decided. If there is disagreement then a mediator is to be consulted. By the time the mediator conducts a number of sessions, the opportunities might be past. More conflict is likely to result not less.

R. Do you recognize this document? (Referring to Dr. Clark' s exhibit GG - Dr. Clark's parenting plan)

T. Yes.

R. Have you reviewed this document?

T. Yes.

R. Based on your experience with children and parenting plans, if a parenting plan similar to this one were applied to the hypothetical situation I described to you, what is your opinion about the likely or potential outcomes?

T. I think this plan is much more realistic than Dr. McLeod's. It does not remove parenting time from Dr. McLeod but does allow for Dr. Clark to have the authority to make parental decisions on her own thus strengthening her credibility and relationship with the minor child. Parents who do not have the authority to carry out parental guidelines lose credibility with children. This plan does not make the mediator the child's parent. If anything I think it is quite flexible and generous to Dr. McLeod in that there is a gradual lessening of parenting time. As this child moves into a period of life where decisions need to be clear and unambignous, not made by committee, this plan would clearly be in the best interest of almost any child caught in the situation of a high conflict separation.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 18th day of August, 2003, she served the foregoing *Reconstructed Testimony of Dr. Throckmorton*, by hand delivering a true and correct copy to opposing counsel at the address below:

Gina B. Weitzenkorn
Mills & Weitzenkorn, P.C.
1441 18th Street, Suite 150
Denver, CO 80202

/s/ _____
Amy Desai

APPENDIX X

DISTRICT COURT,
CITY & COUNTY OF DENVER, COLORADO
Court Address: 1437 Bannock St., Room 256
Denver Colorado 80202

Case Number 96 DR 39
Courtroom 21/15A

Motion Granted
J. Coughlin
September 11, 2003

[Dated September 3, 2003]

In Re the Custody and Support of:	)
	)
E.L.M.C.,	)
minor child	)
	)
And concerning	)
	)
CHERYL ANN CLARK and	)
ELSEY MAXWELL MCLEOD,	)
Co-Petitioners.	)
	)

Attorney for Co-Petitioner Cheryl Ann Clark:

Name: James P. Rouse
Amy D. Desai
7400 E. Orchard Road, Suite 3000
Greenwood Village, CO 80111
Phone Number: 303-694-0694
FAX Number: 303-694-0630
E-mail: jimrouseatty@cs.com
Atty.Reg.#: 10675 (Rouse), 30112 (Desai)

MOTION TO APPROVE UNOPPOSED RECONSTRUCTED CLOSING ARGUMENT APRIL 15, 2003, PERMANENT ORDERS HEARING FOR INCLUSION IN RECORD ON APPEAL

Comes now Co-Petitioner/Appellant Dr. Cheryl Clark, by and through counsel, Rouse & Associates, P.C., and submits the attached Reconstructed Closing Argument April 15, 2003, Permanent Orders Hearing, as it was submitted, with the attachment, to opposing counsel on August 22, 2003. The attached reconstructed closing argument was read into the record by Mr. Rouse on April 15, 2003, in the Permanent Orders Hearing in this case. This reconstructed closing argument is submitted for inclusion in the Record on Appeal, Court of Appeals case number 03 CA 1121, under C.A.R. 10(c).

1. Pursuant to C.A.R. 10(c), the attached document with its attachment was submitted to opposing counsel on August 22, 2003.

2. Opposing counsel has offered no changes or objections to the reconstruction. The time for objections or changes has run.

3. Pursuant to C.A.R. 10(c), Dr. Clark now submits this unopposed Reconstructed Closing Argument (attached hereto) and requests the District Court Judge to approve the same for inclusion in the Record on Appeal....

APPENDIX Y

DISTRICT COURT,
CITY & COUNTY OF DENVER, COLORADO
Court Address: 1437 Bannock St., Room 256
Denver Colorado 80202

Case Number 96 DR 39
Courtroom 21/15A

[Dated September 3, 2003]

In Re the Custody and Support of:	)
	)
E.L.M.C.,	)
minor child	)
	)
And concerning	)
	)
CHERYL ANN CLARK and	)
ELSEY MAXWELL MCLEOD,	)
Co-Petitioners.	)
	)

Attorney for Co-Petitioner Cheryl Ann Clark:

Name: James P. Rouse
Amy D. Desai
7400 E. Orchard Road, Suite 3000
Greenwood Village, CO 80111
Phone Number: 303-694-0694
FAX Number: 303-694-0630

E-mail: jimrouseatty@cs.com
Atty.Reg.#: 10675 (Rouse), 30112 (Desai)

MOTION TO APPROVE UNOPPOSED RECONSTRUCTED CLOSING ARGUMENT APRIL 15, 2003, PERMANENT ORDERS HEARING FOR INCLUSION IN RECORD ON APPEAL

Comes now Co-Petitioner/Appellant Dr. Cheryl Clark, by and through counsel, Rouse & Associates, P.C., and submits the attached Reconstructed Closing Argument April 15, 2003, Permanent Orders Hearing, as it was submitted, with the attachment, to opposing counsel on August 22, 2003. The attached reconstructed closing argument was read into the record by Mr. Rouse on April 15, 2003, in the Permanent Orders Hearing in this case. This reconstructed closing argument is submitted for inclusion in the Record on Appeal, Court of Appeals case number 03 CA 1121, under C.A.R. 10(c).

1. Pursuant to C.A.R. 10(c), the attached document with its attachment was submitted to opposing counsel on August 22, 2003.

2. Opposing counsel has offered no changes or objections to the reconstruction. The time for objections or changes has run.

3. Pursuant to C.A.R. 10(c), Dr. Clark now submits this unopposed Reconstructed Closing Argument (attached hereto) and requests the District Court Judge to approve the same for inclusion in the Record on Appeal.

4. Counsel for Dr. Clark hereby certifies to the Court that they have taken all reasonable steps to ensure the accuracy of the attached reconstruction and have met or exceeded the requirements of the applicable rules. (See signed affirmation of Mr. Rouse regarding accuracy in the cover pleading attached).

Respectfully submitted this 3rd day of September, 2003.

Rouse & Associates, P.C.

/s/ _____
James P. Rouse,
Amy D. Desai, 30112
Attorneys for Co-Petitioner/Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 5th day of ~~August~~ September, 2003, she served the foregoing *Motion to Accept Reconstructed Closing Argument,* by depositing a true and correct copy to opposing counsel in the mail, postage paid, to the address below:

Gina B. Weitzenkorn
Mills & Weitzenkorn, P.C.
1441 18th Street, Suite 150
Denver, CO 80202

/s/ _____
Amy Desai

APPENDIX Z

DISTRICT COURT,
CITY & COUNTY OF DENVER, COLORADO
Court Address: 1437 Bannock St., Room 256
Denver Colorado 80202

Case Number 96 DR 39
Courtroom 21/15A

[Dated August 22, 2003]

In Re the Custody and Support of:	)
	)
E.L.M.C.,	)
minor child	)
	)
And concerning	)
	)
CHERYL ANN CLARK and	)
ELSEY MAXWELL MCLEOD,	)
Co-Petitioners.	)
	)

Attorney for Co-Petitioner Cheryl Ann Clark:

Name: James P. Rouse
Amy D. Desai
7400 E. Orchard Road, Suite 3000
Greenwood Village, CO 80111
Phone Number: 303-694-0694
FAX Number: 303-694-0630

E-mail: jimrouseatty@cs.com
Atty.Reg.#: 10675 (Rouse), 30112 (Desai)

RECONSTRUCTED CLOSING ARGUMENT OF JAMES P. ROUSE APRIL 15, 2003, PERMANENT ORDERS HEARING

Comes now Co-Petitioner/Appellant Dr. Cheryl Clark, by and through counsel, Rouse & Associates, P.C., and submits the following reconstructed closing argument, a true and correct copy of which (consisting of eleven (11) typewritten pages) is attached hereto and made a part hereof, as given by James P. Rouse, on April 15, 2003, in the Permanent Orders Hearing in this case. This reconstructed closing argument is submitted for inclusion in the Record on Appeal, Court of Appeals case number 03 CA 1121, under C.A.R. 10(c).

Counsel, James P. Rouse, hereby swears and affirms that the attached reconstructed closing argument is a direct reproduction of his argument, as he drafted it and read it into the record on April 15, 2003. Since Mr. Rouse drafted his closing argument prior the hearing and read it directly into the record, it was preserved unaltered in his files since that time and is correctly reproduced below.

DATED this 22nd day of August, 2003.

ROUSE & ASSOCIATES, P.C.

By: /s/ _____
James P. Rouse

STATE OF COLORADO)
)ss.
COUNTY OF ARAPAHOE)

Subscribed and sworn to before me this 22nd day of August, 2003. Witness my hand and official seal.

/s/ _____
Notary Public

My commission expires: 1/15/04

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 22 day of August, 2003, he served the foregoing *Reconstructed Closing Argument of James P. Rouse April 15, 2003, Permanent Orders Hearing,* by hand delivering a true and correct copy to opposing counsel at the address below:

Gina B. Weitzenkorn
Mills & Weitzenkorn, P.C.
1441 18th Street, Suite 150
Denver, CO 80202

/s/ _____
James P. Rouse

RECONSTRUCTED CLOSING ARGUMENT

This is not a divorce case. The parties were never married. It is against the the law for them to be married.

Cheryl Clark is the only legal parent that E.L.M.C. has. Only Cheryl Clark adopted E.L.M.C. It is the legal parent

who is by law has the right and duty to make decisions for the child. In a divorce there are two legal parents and the divorce court is charged with allocating parental responsibilities between a legal father and a legal mother.

Elsey McLeod claims E.L.M.C. has two momies. That is not the law in this state. *N.A.H. v. S.L.S.* A child in Colorado can by law have only one mother. Elsey McLeod, by her own words does not claim to be a father. Therefore she admits she is not a legal parent of E.L.M.C.

In this situation, parental responsibilities, i.e., decision making, by law belongs to Cheryl Clark

As E.L.M.C.'s sole legal parent, Cheryl Clark comes to this court with a presumption that her decisions are in the best interests of E.L.M.C. (*Troxel*, U.S. Supreme Court cases prior to *Troxel,* and post *Troxel* cases from Colo. and other states) Cheryl Clark has a fundamental constitutional right to direct the upbringing, education, religious training, medical care, activities and everything else related to E.L.M.C. This court can not substitute its judgment for Cheryl Clark unless it has a compelling reason to do so. That compelling reason would exist only if Elsey McLeod can prove by clear and convincing evidence that Cheryl Clark's plan for E.L.M.C.'s life would prove harmful to E.L.M.C. The burden is on Elsey McLeod She has failed to carry her burden.

There is no credible evidence that Cheryl Clark is not a fit parent. She is a good mother to E.L.M.C. The only hint that we have that there might be a hint that Cheryl Clark might not be a good parent is some vague reference by Elsey McLeod that she "has concerns." You cannot not believe anything Elsey McLeod says. Her testimony on the witness stand in this hearing is not credible.

Elsey McLeod's concerns about Cheryl Clark's fitness are so real that Elsey McLeod herself proposes that Cheryl Clark have E.L.M.C. 50% of the time by herself unsupervised. Elsey McLeod's concerns about Cheryl Clark fitness are so real that Elsey McLeod never asked for a psychological exam of Cheryl Clark Elsey McLeod's concerns about Cheryl Clark fitness are so real that Elsey McLeod never asked for a parenting evaluation in this case. You can't believe Elsey McLeod Her vague concerns are something that appeared in this case for the first time yesterday. There is no credible evidence that Cheryl Clark is not a proper and fit mother for E.L.M.C.

On the other hand, witness after witness testified that Cheryl Clark is a good mother. The teacher so testified. Dr. Prina so testified. Heather Tarr so testified. These are all witnesses called by Elsey McLeod herself. Not one of the witnesses called by Cheryl Clark said she was not a good mother.

Cheryl Clark is a good, proper, and fit mother to E.L.M.C. and is entitled to the unrebutted presumption that her plan for E.L.M.C. is in E.L.M.C.'s bests interest. This court has no reason to interfere. Indeed the proper thing for this court to do is dismiss Elsey McLeod's motion.

Even if the court feels it should go through the best interests analysis of C.R.S. § 14-10-124, Cheryl Clark' s plan should still prevail.

First, the name issue. Elsey McLeod insisted on the witness stand that E.L.M.C. has always used the name E.L.M.C. The documents in evidence show you can't believe Elsey McLeod Ex. A. medical records, are in the name of E.L.M.C. and have been since Elsey McLeod came to the

United States. In Dr. Prina's office, Elsey McLeod was there when pg. 1 of exhibit A was filled out, Cheryl Clark did do a name change for E.L.M.C., and added "McLeod" as a middle name. On the witness stand Elsey McLeod disputes Cheryl Clark's version. Documents in evidence show that Elsey McLeod lied about the name issue. See, Ex. D. pg. 3, part of the dermatologist's records completed by Elsey McLeod; Last name - Clark, First name - E.L.M.C., Middle name - McLeod. That was a mere four months age. See, Ex. YY, Elsey McLeod's correspondence to Dr. Katz on January 30, 2003. A mere 2 and ½ months ago. Pg. 5, "Technically, my name is a middle name...." In the kindergarten dinosaur program, E.L.M.C. referred to herself as "E.L.M.C.", not "Elsey McLeod." The choice of a child's name is the prerogative of the legal parent.

The court raised the specter of a possible estopple argument yesterday. Elsey McLeod raised that argument when the parties were ordered to brief the validity of the prior joint custody decree. The argument was rejected then. That portion of the magistrate's order was not timely appealed to the district judge. The magistrate's order is a final, non-appealable order. Estopple cannot be raised again.

The prior joint custody decree was declared void. That means it is of no effect and can not be considered by the court for any purpose. *Burleson v. D. Ct.*, 586 P.2d 665 (Colo. 1978). There is no evidence of what Cheryl Clark's intent was regarding the parenting of E.L.M.C. under the now void custody decree, other than what she testified to in this hearing. The only thing that might be construed as an expressed intention contrary to what Cheryl Clark testified about her intentions being in this hearing is the so called trial brief submitted by her prior counsel. Arguments and statements of counsel, and that is all the trial brief is, are not

evidence to be considered by the trier of fact. *(Colo. Civ. Jury Inst.* 3.7) In any event, Cheryl Clark can change her mind based on changed circumstances.

Under C.R.S. § 14-10-124 the prior parenting of the child is one factor for the court to consider. Prior to the magistrate's order, the parenting was not 50-50. Elsey McLeod now says it was. But it is uncontroverted that Elsey McLeod worked full time and had a private practice; Cheryl Clark worked part time. There is no way the parenting time could have been equal prior to the court imposed 50-50 parenting time. Prior to court imposed 50-50 parenting time Cheryl Clark always took E.L.M.C. to school, doctor's appointments, and determined extra curricular activities. Both parties say E.L.M.C. did fine while they were together. Parenting was not 50-50. The child was doing well. If it's not broken, why fix it. As Dr. Katz stated - why impose 50-50 in first place. There is no reason to believe that child will not do well under Cheryl Clark's plan. The court should never have imposed 50-50 parenting in the first place.

50-50 parenting is not appropriate. This is obviously a high conflict case. Elsey McLeod, for purposes of this hearing, says that the conflict is not high. You can not believe Elsey McLeod's testimony. She herself in the volume of letters and e-mails in evidence says the adult parties cannot agree about anything. The only thing they could negotiate with out help was a one hour difference in parenting time. (See Exhibit W) In writing, Elsey McLeod says they can't agree about anything. It's been going on since E.L.M.C. was adopted. The adoption of E.L.M.C. ruined the relationship between Elsey McLeod and Cheryl Clark The controversy continues. Dr. Katz himself says that Janet Johnston is a "real expert." According to the 1994 Janet Johnston article, 50-50 for children in a high conflict separation is bad for children,

especially girls. In a high conflict situation, according to Janet Johnston, it is not likely the conflict will abate. That certainly appears to be the situation in this case, Elsey McLeod incredible assertions to the contrary not withstanding. Dr. Katz did not think 50-50 was the way to go. The authorities relied on by Dr. Katz don't think 50-50 is appropriate. Divorce Wars, APA publication, "Joint physical custody, hailed as the solution to inter-parental conflict, has been largely a disappointment." Dr. Throckmorton doesn't think 50-50 is appropriate. The only one you testified in this case who thinks 50-50 is appropriate is Elsey McLeod You can't believe anything Elsey McLeod said in this hearing. In Elsey McLeod's 1/30/03 correspondence to Dr. Katz, Ex. YY, pg. 4, describes the 50-50 as a "pathological dividing of time with E.L.M.C.." Yet, for purposes of his hearing, Elsey McLeod says this pathological 50-50 division is good for E.L.M.C.. E.L.M.C. doesn't need this. The court should not subject E.L.M.C. to 50-50 parenting. No one really believes it is in E.L.M.C.'s best interests. Even Elsey McLeod admitted under oath yesterday that she doesn't know if her having something less than an exact 50-50 split of parenting time would harm E.L.M.C.

Elsey McLeod has demonstrated an inability to put here own needs ahead of E.L.M.C.'s. When the conflict was at its highest, just before she moved out, she knew the conflict was hurting E.L.M.C., but she elected to stay in order to preserve her rights. See Exhibits J, K, M, II. Elsey McLeod knew she was the one who would be moving, but she would not move until she got what she wanted. Elsey McLeod made a scene in the Dr. office in front of E.L.M.C.. She involves third parties, such as doctors, orthodontists, teachers, the nanny, in the dispute. She makes sure they know who she is and what her status is. This is not good for E.L.M.C.

Dr. Katz said that if prior to separation the parenting was not 50-50, but the child was doing well, there would be no reason for the court to impose 50-50 for temporary orders. No evidence was heard before 50-50 parenting was imposed. It shouldn't have been done in first place. It certainly shouldn't continue. Is E.L.M.C. doing well now? Elsey McLeod tells court she is, but Dr. Katz says the high conflict has to be affecting child in some way. In deed it is, see Exhibit YY, pg. 6. Elsey McLeod tells Dr. Katz that E.L.M.C. gets anxious about serious things. Yet, Elsey McLeod doesn't tell Cheryl Clark. This bodes ill for 50-50 parenting. Elsey McLeod says E.L.M.C. needs therapy. Cheryl Clark asks for what. Elsey McLeod won't tell her.

On the other hand, Cheryl Clark has demonstrated time and time again that she will sacrifice her needs to put E.L.M.C.'s needs first. She couldn't really afford a new house in the Slavens district, but she did it any way for E.L.M.C. Cheryl Clark cut back work hours, sacrificed income, to be with E.L.M.C.. She arranged her work schedule so she could take E.L.M.C. to school with out putting her in daycare. Elsey McLeod did none of this for E.L.M.C.. E.L.M.C. is Cheryl Clark's 1st priority (Kay Rice).

The parties have disagreed and fought over everything in the past. They are currently in dispute over religious upbringing of E.L.M.C.. E.L.M.C. doesn't need to be in this dispute. No doubt the high conflict between Cheryl Clark and Elsey McLeod will continue. Janet Johnston says in general, that is the case. Elsey McLeod says it won't. You cannot believe anything Elsey McLeod says in this hearing. In the last hearing, she said the relationship was high conflict. In this

hearing she says she changed her mind after finding out about the legal significance of her prior admission. Elsey McLeod's pathological 50-50 division of time and parental responsibilities is, in the words of Dr. Throckmorton, an accident waiting to happen. Cheryl Clark is not arbitrarily changing the parenting plan. She has valid concerns - such as the conflict's effect on E.L.M.C., mixed messages regarding religion, Elsey McLeod withheld information regarding E.L.M.C.'s mental state. The fit legal mother should make the decision.

Dr. Clark must be given her presumption, the current state of the law in Colorado so requires.

The CCRS case was decided before *Troxel.* The Colorado Court of Appeals has now addressed *Troxel* in the context of parenting cases.

"One of the relevant factors in determining a child's best interests is the 'wishes of the child's parents as to parenting time.' Section 14-10-124(1.5)(a)(1), C.R.S." *In re Custody of C.M.* The best interests standard, which is the guiding principal in awarding custody even in disputes involving non-parents, is subject to the presumption that the legal parent has a first and prior right to custody. *Id.* This presumption does not extend to non-parents, even though the non-parent may have been involved in the child's life on a daily basis. *In the Matter of the Petition of M.G.,* 58 P.3d1145, 1147 (Colo. App. 2002)(fundamental liberty interesting in rearing children does not belong to a guardian).

Where there is a dispute over parenting between psychological parents and the legal parent, the court cannot ignore the presumption accorded to the legal parent. *People*

ex rel A.M.K., ___ P.3d ___ , 2003 WL 548830, *2(Colo. App. 2003).

This court should, based on the evidence before it dismiss Elsey McLeod's motion. The law as expressed by the Colorado Court of Appeals and the other cases in our Trial Brief requires this. Even if Elsey McLeod is a psychological parent, she does not have the same legal and constitutional rights as the fit legal parent, Cheryl Clark. No court has ever said a psychological parent has the same legal and constitutional rights as the fit legal parent. This court should not become the first court in the country to do so. This court cannot treat Elsey McLeod as a divorcing legal parent. This court should not adopt the pathological 50-50 parenting plan proposed by Elsey McLeod. Dr. Clark's plan proposes significant time for Elsey McLeod with E.L.M.C. The court cannot, by law, substitute its judgment about what is best for E.L.M.C. for Dr. Clark's judgment. The court cannot, by law, substitute Dr. Katz' "if-it-isn't-broken-why-fix-it" theory for Dr. Clark's judgment. The court cannot, by law, substitute Elsey McLeod's judgment about what is best for E.L.M.C. for Dr. Clark's judgment.

If the court does not dismiss Elsey McLeod's motion for parenting time, the court must, based on the evidence before it, make Dr. Clark's plan the order of the court.

APPENDIX AA

DISTRICT COURT,
CITY AND COUNTY OF DENVER, COLORADO

Civil Action No. 96DR39, Courtroom 21

In re the Matter of:	)
	)
CHERYL ANN CLARK,	)
Petitioner,	)
	)
and	)
	)
ELSEY MAXWELL McLEOD,	)
Respondent.	)
	)

REPORTER'S TRANSCRIPT

The hearing on Permanent Orders in this matter was held on July 30, 2002, before the HONORABLE JOHN W. COUGHLIN, Judge of the District Court.

FOR THE PETITIONER: James P. Rouse, Sr.

FOR THE RESPONDENT: Gina B. Weitzenkorn, Esq.

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* * *

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are not working and we're entitled to lay our foundation for it.

THE COURT: I'll allow the question.

Q (By Mr. Rouse) You said that you looked into artificial insemination in approximately 1992?

A Yes, that's correct.

Q And who was going to be artificially inseminated?

THE COURT: I don't need to know that. I need to know when the child came into the picture. What they talked about, I really don't care. Let's talk about when the child came into the picture and what happened.

Q (By Mr. Rouse) Was there any discussion about adoption of a child between you and Ms. McLeod?

A In August of 1994, I approached Dr. McLeod and told her that I wanted to adopt a child from China.

Q And what was Ms. McLeod's reaction?

A At first she seemed reluctant, and that's why the background about artificial insemination was important. Because of that history, she had decided not to go ahead and have a biological child. She decided she didn't want to have children.

When I wanted to have a child in 1994, and I [p.12] approached her about that, I was concerned partly because it would be the end of our relationship because she expressed already that she didn't want to have children and had decided not to pursue artificial insemination. So when this issue came up about my desire to adopt, I wasn't sure how that would go and whether or not she wanted to stay in the relationship.

She said she supported me in pursuing the adoption, but that she would not participate in the cost of the adoption or the process of the adoption based on this background in 1992 and what happened during that.

Q Dr. Clark, did you, in fact, pursue an adoption of a child from China?

A Yes, I did.

Q And how did you go about pursuing that?

A Well, the first step was a phone call to the adoption agency to find out what the process of adoption would be and the approximate costs and what forms and all that had to be filled out. So I spoke with them, and I said -- there was an informational meeting a couple weeks later, went to the meeting, got more information about the process of the adoption and the extensive amount of paperwork and the cost of the adoption at that point in time.

* * *

[p.33]

through 28 and Exhibit 31 of any problems in making decisions about anything?

A Well, I would say it's safe to say that even prior to breaking up, we disputed just about everything with regards to E.L.M.C.

Q And did religious beliefs ever become a problem?

A Yes, they did.

Q In what context?

A As I was discussing with Dr. Cogan before this started, there is good and bad that comes out of a situation like that, and I took back the faith of my childhood and early adult life.

Q When did this occur?

A It started occurring shortly after our break-up and after the temporary orders. It was a very stressful time.

Q In this correspondence that we've been looking at, did Dr. McLeod express any concerns about your change in religious beliefs?

A Yes.

Q And what was expressed?

A She was concerned about homophobia.

Q And what was her concern?

A That by taking E.L.M.C. to church and to Sunday

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Q Why was McLeod added to E.L.M.C.'s name?

A Zee was an important person to me, and it's traditional in my family that the children wind up with a middle name that contains the name of the important adult in the parent's life. Like my brother, his middle name is my dad's cousin, or something like that. My brother and his wife all have middle names of people that are important to them, grandparents, sisters, that kind of thing.

Q Is it the custom in your family to change the last name to reflect someone who is important?

A No.

Q Did you explain that custom to Dr. McLeod?

A As I recall, we talked about it, but I don't remember exactly, a long time ago.

Q Do you have any concerns, long-term concerns about E.L.M.C.'s development as a result of the parenting schedule and parenting conflict with you?

A I do.

Q And what are those concerns?

A I'm concerned that, number one, E.L.M.C. clearly knows the difference between Dr. McLeod and myself. She has always known since she was a baby that I adopted her, and she has expressed confusion to me in the past year and a half about exactly what all does

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this rotating three-day schedule is neither of those. It's neither predictable or stable to her. She's having -- these are not major difficulties, but she's having some difficulty. I think she heeds a stable schedule that's predictable for her. I think she knows very clearly between the adoptive mother and Dr. McLeod. That doesn't mean that she doesn't care and love both of us. I think she knows the difference.

I have concerns. She's Chinese. She's adopted. She spent the first five months in an orphanage with multiple care givers. And it's difficult to know whether some of the issues she has right now is because of that or because of this break-up, and I think it's tough to answer that question. As a psychiatrist, I'm not even sure a mental health person can answer that question. We can't go back and figure out, really figure out, how things would have been different had she not spent the first five months of her life in an orphanage.

The issue of religion has come up, and I knew that was going to be an issue of contention, to say the least, and has nothing to do with homophobia. It has to do with my desire to have a Christian background and upbringing and let her make that choice whether she wants to follow the faith or not. But I [p.74] want to expose it to her so she knows.

And Zee has concerns whether she would be homophobic. We're talking about Bible stories, basic Christian Bible stories about Moses and The Ten Commandments and Jesus. It's not homophobia. It's about the worship of God.

THE COURT: You wouldn't take her to a place that was homophobic?

THE WITNESS: No, sir.

THE COURT: What church do you take her to?

THE WITNESS: Mission Hills Church.

THE COURT: Don't you think that maybe she's going to have a problem because of five-and-a-half months in an orphanage with many different care givers and the fact that you have split up?

THE WITNESS: I think both of those factors certainly affect her.

THE COURT: You think one week away from you is too much, but would it assist if, during that one week, on Wednesday when she goes to gymnastics, the person that didn't have the child would take her to gymnastics and take her out to dinner?

THE WITNESS: E.L.M.C. has expressed that that's a difficult time span for her, not the gymnastics thing, but other than summer vacations, she doesn't

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